Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the retroactive application of amended Fed.R.Civ.P. 50 and 59 impermissibly violate substantive rights of parties protected by the principle of finality of judgments?

II. Should this Court provide clarification for the courts below of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

III. Should an appellate decision which reversed a trial court's admission of expert causation opinions be allowed to stand where the appellate court obviously failed to employ the "abuse of discretion" standard deemed applicable in such reviews by this court's opinion in *General Elec. Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512 (1997)?

IV. Does the "abuse of discretion" standard require that an appellate court, before reversing a trial court's admission of causation opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), give consideration to the pretrial offers of proof and other related evidence presented to and considered by the trial court in addition to the trial testimony of the experts whose opinions are at issue?

V. Is *Schudel v. General Elec. Co.'s* holding, that expert testimony to be admissible must be supported by peer-reviewed scientific articles on the particular injury, inconsistent with other Ninth Circuit decisions, other circuit court of appeals decisions, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

LIST OF PARTIES

Petitioners are Deborah Williams (a Plaintiff in the District Court and an Appellee in the Court of Appeals), David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, and Kathrene Froese (Plaintiffs in the District Court and Appellants in the Court of Appeals). Additional Plaintiffs below filing separate petitions are John and Ruth Hopkins and Merlin Carlson, Jr.

Respondents in this court (Defendants in the District Court and both Appellee and Appellants in the Court of Appeals) are General Electric Company and Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation, who were Defendants, Appellants and Appellees both below, hereinafter jointly referred to as "GE".

LIST PURSUANT TO RULE 29.6

According to its prior corporate disclosure statements, the General Electric Company is a publicly held corporation with no parent companies. Its subsidiaries and affiliates are General Electric Capital Corporation; General Electric Credit International, N.V.; Montgomery Ward and Company, Inc.; General Electric Capital Preferred Asset Corporation; CAMCO, Inc. (Canada); General Electric Capital Services, Inc.; GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; GNA Corporation; Mercur Bank (Austria); Imaging Financial Services, Inc.; and Dart V. Kraft, Leasing Corporation.

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Kaiser Aluminum and Chemical Corporation, a wholly owned subsidiary of Kaiser Aluminum Corporation, has equities securities which are publicly held. Kaiser Aluminum Corporation's parent, Maxxam, Inc., has debt and equity securities which are publicly held, and affiliates with either publicly held equity or debt securities are Maxxam Group, Inc.; the Pacific Lumber Company; Scotia Pacific Holding Company; and Sam Huston Race Park, Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 23, 1997, for the reasons enumerated herein.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, Ninth Circuit, that gives rise to this petition is published at 120 F.3d 991 (9th Cir. 1997), and in this appendix as App. 1. By order filed November 24, 1997, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. App. 2. The judgment dated July 13, 1994 is at App. 4. The opinion and amended judgments entered by the trial court on November 25, 1994, following the defense post-trial motions are at App. 3 and 5 respectively. A January 17, 1995 order certifying appeal is at App.6.

JURISDICTION

This case was removed from state court on diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). The judgment of the District Court was entered on July 13, 1994. The decision of the Ninth Circuit Court of Appeals was filed July 23, 1997, and rehearing was denied by an order dated November 24, 1997. This petition for certiorari has been filed within 90 days of entry of the denial of the petition for rehearing, and hence this court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes, rules and constitutional provisions involved are lengthy and thus set forth in full in App. 7.

STATEMENT OF CASE

Petitioners Deborah Williams, Kathrene Froese, David Schudel, Tim Schudel, Daniel Glass and Craig Thompson,[1] brought a negligence claim against Appellants General Electric Company and Kaiser Aluminum and Chemical Corporation for damages. Petitioner Sandra Schudel, wife of Tim Schudel, alleged loss of consortium only.

All Plaintiffs but Mrs. Schudel were employees of Qualified Personnel Inc. QPI was hired to provide workers to General Electric (GE) to assist GE in the cleanup of PCBs at Kaiser's Trentwood facility in Spokane, Washington. Plaintiffs all developed various neurological and respiratory problems during and after their unprotected exposure to a multitude of organic solvents and other federally and state regulated hazardous chemicals which GE had them use in the cleanup, including TCA and PERC.[2]

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[1] Plaintiffs John and Ruth Hopkins and Merlin Carlson, Jr. will be filing separate petitions in this court by and through their separate counsel.

[2] The hazardous chemicals were principally of two types – Organic solvents and caustic detergents. Trichloroethane (TCA); Perchoroehtylene (PERC); Naphthalene; Trimethylbenzenes; 1,2,4 – Trimethylbenzene (Xylene); Sodium Hydroxide; Aryl Sulfonate; Phosphate; Silicates; Chelate (EDTA-type); Alkyl aryl Polyether; Phosphate ester; Sodium Tripolyphosphate; Surfactant Nonylphenoxpoly; Nono and Diakly Acid Phosphate; Ethylene glycol; Monobutyl ether; Cycohexanal; Monochanolomine; C9-C12 Paraffins and C9-C12 Cycloparaffins, in addition to other chemicals, were used. These hazardous chemicals were being mixed with other chemicals such as "409" and "Wiley's" driveway cleaner, then put in 409 spray bottles.

Ms. Deborah Williams was hospitalized upon return to Vancouver, Washington, with severe symptoms of organic solvent poisoning. Ms. Williams and the other Plaintiffs were exposed to 5-10 times the permissible exposure limits set by OSHA.[3] TCA and PERC are controlled by government regulations because of their known hazards.

After leaving the hospital Ms. Williams was treated by a number of doctors, including Dr. William Morton, M.D., a professor of occupational and environmental medicine at Oregon Health Science University. Dr. Morton had extensive experience and scientific publications in the field of toxic exposure to hazardous chemicals. He testified on a more probable than not basis that Ms. Williams suffered from toxic encephalopathy and severe pulmonary injuries as a result of this unprotected, overexposure to known hazardous chemicals.[4]

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[3] These regulations include requiring the use of appropriate pre-planning, continuous air monitoring, ventilation, training, respirators, medical examinations and clothing; none of which were done or provided by GE.

[4] At the time of the exposure, Deborah Williams experienced rash, bloody noses, headaches, coughing (productive of blood) and difficulty breathing. Once back to Vancouver, she went to the hospital with respiratory distress. Evidence established that since the exposure she has had a persistent cough, shortness of breath, confusion, memory loss, mood swings, irritability, personality changes, and depression. Evidence at trial was that she is essentially housebound and unemployable, that she will need medication to assist her in breathing for the remainder of her life, and that she needs help even with her day to day responsibilities as a mother because of her difficulty with her memory and confusion. While Ms. Williams, a petite woman, may have been hit harder by this poisoning, the other Petitioners herein suffered from many of

A jury returned verdicts for the Plaintiffs.[5] Judgment was entered on the verdicts on July 13, 1994. The versions of Fed.R.Civ.P. 50 and 59 applicable at the time required any post-trial motions thereunder to be "served" or "served and filed" not later than 10 days after entry of judgment. Defendants *filed* their motions under Fed.R.Civ.P. 50(b) and 59(b) on the 10th day following entry of judgment. GE did not timely *serve* its post trial motions on counsel for Petitioners or counsel for Plaintiffs Hopkins. GE timely served counsel Marcia Meade who only represented Merlin Carlson. Further, GE did not file a notice of appeal, nor did any other party, within 30 days of the original date of judgment.

The trial court did not act under its Rule 59(d) authority to grant a new trial within 10 days of entry of judgment. It did, however, rule on Defendant's post-judgment motions four and a half months later on November 25, 1994, despite Petitioners' challenge to the jurisdiction of the trial court to rule on said motions due

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the same symptoms in varying degrees. All of these Petitioners (except Mrs. Schudel) had symptoms that medical science recognized as signs of poisoning from solvents. Because the *Daubert* issues presented by this Petition focus only on Petitioner Williams, with all other Petitioners joining only as to the first question presented herein, the factual description of injuries and damages sustained by the other Petitioners herein is substantially abbreviated.

[5] The jury's verdicts for the Petitioners hereto were: Deborah Williams – $1,907,783; Kathrene Froese – $1,459,332; David Schudel – $1,130,711; Tim Schudel – $1,051,270; Sandra Schudel – $50,000; Daniel Glass – $956,146; and, Craig Thompson – $556,199. The jury deemed the injuries and damages to the other 3 Plaintiffs represented by separate counsel from this poisoning to have been substantial as well.

to Defendant's failure to timely serve the same. In ruling on GE's Rule 50(b) motions, the court determined that a physician's testimony supporting several of the verdicts had been improperly admitted necessitating a grant of JMOL to GE on the cases of Dave Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson. Despite GE's waiver, by its failure to object to the form of the special verdict, the trial court granted Defendants' request for a new trial with regards to the Kathrene Froese, John and Ruth Hopkins, and Merlin Carlson cases. The trial court denied JMOL, or a new trial, to GE on Deborah Williams' verdict and judgment. In making this decision, the trial court rejected GE's challenge to Ms. William's expert opinions on causation, concluding that Dr. Morton's methodology was scientifically reliable.

On December 27, 1994, 167 days after entry of judgment, GE filed its first notice of appeal, appealing the Deborah Williams' judgment. The trial court entered findings certifying appeals from the new trial granted by its order dated November 25, 1994 under Fed.R.Civ.P. 54(b) on January 17, 1995. On January 24, 1995, GE filed a second notice of appeal as to Ms. Williams' judgment. Notices of appeal were timely filed following the trial court's November 1994 and January 1995 order described above on behalf on Plaintiffs Schudel, Schudel, Schudel, Froese, Glass, Thompson, Hopkins, Hopkins, and Carlson.

This Court filed an order amending Fed.R.Civ.P. 50 and 59 on April 27, 1995, changing the requirement that "*service*" or "*service* and filing" of Rule 50 and Rule 59 shall occur not later than 10 days after the entry of judgment. The amended rule was ordered effective December 1, 1995, to "all proceedings and civil cases

thereafter commenced and, insofar as just and practicable, all proceedings and civil cases then pending". It provided that such motions shall be *"filed"* no later than 10 days after entry of judgment.

On July 23, 1997, the Ninth Circuit Court of Appeals issued its opinion in this case. It concluded that although GE had *not* timely served the Rule 50 and 59 post-trial motions on Petitioners, it was "just and practicable" to retroactively apply the amended rules. The appellate court further ruled that it lacked jurisdiction to review the District Court's grant of JMOL and new trial as to Kathrene Froese and dismissed her appeal. It reversed the grant of JMOL as to David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson, and remanded their cases. It found that the trial court had erred in admitting Deborah Williams' neurological expert testimony on causation. It vacated Ms. Williams' judgment, reversed the denial of the motion for new trial as to her claims, and remanded.

On August 5, 1997, Williams, Froese, Schudel, Schudel, Schudel, Glass, Thompson, Hopkins, and Hopkins filed timely petitions for re-hearing and suggestion for hearing *en banc*. On November 24, 1997, the 9th Circuit entered an order denying the petitions for re-hearing and suggestion for hearing *en banc*.

On December 15, 1997, this court decided *General Elec. Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512 (No. 96-188, 1997), ruling that the standard for appellate review of a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is "abuse of discretion."

SUMMARY OF ARGUMENT

There are compelling reasons for granting a writ of certiorari in this case because the Ninth Circuit has erred in two major respects and has, in so doing, entered a decision in conflict with decisions of other United States courts of appeals on the same important matter, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, decided important federal questions that have not been, but which should be, settled by this Court, and decide important federal questions in a way that conflicts with relevant decisions of this Court.

Concerning the first question presented, this court's 4/27/95 order for amendment of Fed.R.Civ.P. 50(b) and 59(b) changed the requirement that "service" of post-trial motions occur not later than ten days after judgment to a requirement that "filing" occur not later than ten days after judgment. The order provided that it was effective 12/1/95 to "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending". The Ninth Circuit below impermissibly applied these changes in the rules retroactively to judgments filed July 13, 1994 which had already vested because, as the Ninth Circuit itself found, defense post-trial motions were not *served* within the 10 days as Fed.R.Civ.P. 50(b) and 59(b) then required. Since no appeal was filed by any party within thirty days of the July 13, 1994 entry of judgments, this retroactive application of amended rules has created the illusion of a revival of jurisdiction that was in fact lost when the defense post-trial motions were untimely served. It has wrongly enabled post-judgment trial and appellate review and reversal of vested judgments, is compelling all of the

Petitioners to this Petition as identified above to retry their claims, and is exposing them to further lengthy and unwarranted appeals. The Ninth Circuit's decision below, in regards to an important federal question concerning a retroactive application of an amendment of civil rules in violation of the principle of finality of judgments, is inconsistent with relevant decisions of the Ninth Circuit and this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Concerning the balance of the questions presented, all of which primarily relate to Petitioner Willams' case, the following arguments apply. The Ninth Circuit granted Defendants a new trial on Petitioner Williams' case. It ruled that the trial court had erred in allowing Petitioner's experts to testify to their conclusions on toxic encephalopathy causation because they were not, in the appellate court's opinion, "scientifically reliable." The Ninth Circuit opinion discussed and criticized *solely* the trial testimony of the experts without reference to extensive pretrial offers of proof or the trial court's decision making process. The Ninth Circuit focused on its belief of a need for peer-reviewed, chemical and dose specific literature to support Ms. Williams' experts opinions on toxic encephalopathy causation and found that concern determinative, showing no deference to the trial court's belief, reached after a consideration of the entirety of the record including the pretrial offers, that these challenged opinions on causation were scientifically reliable and were properly admitted. The appellate court's reversal of this trial court ruling was rendered just prior to issuance, and hence without consideration, of this Court's opinion in *General Elec. Co. v. Joiner, supra* (decided 12/15/97). The

appellate decision is inconsistent therewith in that it obviously failed to employ an "abuse of discretion" standard in concluding that the trial court inappropriately admitted such evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Ninth Circuit decision below is also in conflict with a number of decisions of other United States courts of appeals on the same important matter, as is discussed in more detail below.

ARGUMENT

A. RETROACTIVITY.

1. The Ninth Circuit's opinion below, based upon a retroactive application of amendment to Fed.R.Civ.P. 50 effective after Petitioners' judgments were final, implicates most of the considerations for acceptance of certiorari.

Schudel et al[6] submit that the retroactivity analysis of the appellate court below regarding Rule 50 conflicts with other decisions of the Ninth Circuit and with Supreme Court precedent, most notably *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), and *Hughes Aircraft Co. v.*

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[6] Hereinafter "Schudel," as used in argument concerning the first question presented by this Petition, will refer to David, Tim and Sandra Schudel, Daniel Glass, Craig Thompson, Kathrene Froese, and Deborah Williams, all of the Petitioners herein. Similarly postured are John and Ruth Hopkins, who are filing a separate petition. In regards to the issues involved in Question I, *supra*, Schudel also adopt by reference the more detailed arguments and issues presented by Hopkins' Petition for Certiorari to be separately filed by attorney Thomas C. Phelan.

United States ex rel William J. Schumer, 520 U.S. ___, 138 L.Ed.2d 135 (1997) [which reversed another Ninth Circuit opinion on the issue of retroactivity] and other cases as discussed below. This Court can, by accepting review of this case, help establish uniformity of decisions within the Ninth Circuit, resolve conflicts between the opinion below and this Court's existing decisions on retroactivity, and clarify for lower courts why, how, and when amendments to federal rules may or may not be applied retroactively. Further, the error of the appellate court, arising from retroactive application of an amended rule which revives jurisdiction previously expired such that Petitioners' substantial and vested judgments have been vacated, is a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

2. The Presumption against Retroactivity.

The appellate decision below properly ruled that GE's post-trial motions were untimely. *Schudel v. General Elec. Co.*, 120 F.3d 991, 994 (1997); *citing, Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996). Under pre-amendment Rule 50, failure to serve and file post-trial motions on or before the tenth day following verdict deprives the trial court of jurisdiction to entertain and rule on the motions. *Browder v. Department of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556, 561, 540 L.Ed.2d 521 (1978); and *Carlisle v. United States*, 517 U.S. 134 (1996), citing to *United States v. Lock*, 471 U.S. 84, 101, 85 L.Ed.2d 64, 105 S.Ct. 1785 (1985) [a rule which would authorize untimely filings of post-trial motions would foster an attitude that if "one day late filings are acceptable, ten day late filings might be equally acceptable, and so on and the cascade of

exceptions would engulf the rule erected by the filing deadline . . . "]; *see also, McConnell v. MEBA Medical and Benefits Plan*, 778 F.2d 521 (9th Cir. 1985); and, *Carter v. United States*, 973 F.2d 1479, 1488-89 (9th Cir. 1992). As a result, judgment, by operation of law, vested in Petitioners Schudel on the 31st day after entry of judgment.[7] Absent retroactive application of Rule 50 as amended, these Petitioners would be entitled to have their verdicts reinstated, as the trial court lost jurisdiction to rule on GE's post-trial motions.

Nonetheless, the appellate court concluded that amended Rule 50 should be applied retroactively, stating only that there would be "no prejudice" to Schudel and others by retroactive application of the amended Rule 50 simply because the parties had "briefed the substantive, non-jurisdictional arguments" raised in the appeal. *Schudel, supra*, 120 F.3d at 994. This holding, relying almost exclusively on two Ninth Circuit decisions, *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir. 1995), and, *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994),[8] failed to recognize that the retroactive application of amended Federal Rules of Appellate Procedure which

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[7] It vested on the 31st day following judgment as no party filed a notice of appeal within the 30 days required by Fed.R.App.P. 4, and because untimely post-trial motions do not toll the time within which to file a notice of appeal. *See e.g., dissenting opinion of* Justice Rehnquist in *Needham v. White Laboratories, Inc.*, 454 U.S. 927 at 929-30 (1981).

[8] *Schroeder, supra* and *Wallis, supra*, are easily distinguished. These cases authorized the resurrection of *prematurely* filed notices of appeal by retroactive application of amended appellate procedural rules. Those rulings make sense in that a premature notice of appeal does not adversely affect the strong policy favoring finality of judgments.

occurred in those two cases is totally distinguishable from the retroactive application of amended Rule 50 which occurred here. Quite to the contrary of the claim that "no prejudice will result from application of the amendments", retroactive application of amended Rule 50 deprived Petitioners of their substantive right to a judgment which had become final.

The decision below in this case is directly at odds with the Ninth Circuit's opinion in *Chenault v. United States Postal Service*, 37 F.3d 535 (9th Cir. 1994) which at 537-538, in discussing the retroactive application of a statute, held:

> A newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought under the old statutory scheme because to do so would be manifestly unjust. [Citations omitted]. Conversely, we held that a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that would otherwise be barred under the old statutory scheme because to do so would "alter the substantive rights" of a party . . . [9]

Absent an express declaration that a statute/rule is to be applied retroactively, the appropriate default rule is that there is a strong presumption *against* its retroactive application. *Hughes Aircraft, supra* at 138 L.Ed.2d at 146. In this case, there was no clear expression of retroactivity – this Court's order provided that the Rule 50 amendments were to be applied only to cases commenced after

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[9] *See also, United States v. Bacon*, 82 F.3d 822, 824 (9th Cir. 1996) [statute should not be applied retroactively if it affects the "substantive rights" of a party].

December 1, 1995 and "insofar as just and practicable", to "all proceedings in civil cases then pending" (phrasing discussed further *infra*).

Recently, this Court in *Hughes Aircraft v. ex rel Schumer, supra,* in reversing the Ninth Circuit, held that defining a statute as "jurisdictional" and thus an "exception to the general *Landgraf* presumption against retroactivity" is erroneous, noting:

> Indeed, the Ninth Circuit went further, holding that, absent a clear statement of Congressional intent, there is a strong presumption *in favor of* retroactivity for jurisdictional statutes. 63 F.3d at 1517. The Ninth Circuit simply misread our decision in *Landgraf*, for the only "presumption" mentioned in that opinion is a general presumption *against* retroactivity.

138 L.Ed.2d 146 [emphasis original].[10]

Jurisdictional statutes only affect "where a suit may be brought, not whether it may be brought at all." *Id.* at 146. The *Hughes Aircraft* opinion noted further that if a rule/statute:

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[10] As noted, in *Landgraf* at 128 L.Ed 2nd at 259-60 n. 29, a simplistic analysis of classifying a statute as "jurisdictional" and therefore automatically retroactive, such as was done in this case, is erroneous:

> Our orders approving amendments to federal procedural rules reflect the common sense notion that the applicability of such provisions ordinarily depends on the posture of a particular case . . . we do not restrict the presumption against retroactivity to cases involving "vested rights".

See also, Hodges v. Snyder, 261 U.S. 600, 603, 43 S.Ct. 435, 436, 67 L.Ed. 819 (1923); *Pennsylvania v. Wheeling and Belmont Bridge Comp.,* 59 U.S. 421 437, (18 How.) 15 L.Ed. 435 (1852).

> [C]reates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

The reasoning of *Hughes Aircraft* and *Chenault* are directly applicable to this case. Petitioners Schudel had a substantive and fully vested right to a judgment, which became final on the thirty-first day after judgment. Retroactive application of Rule 50 in this case is not only unjust, it creates jurisdiction for the trial court to entertain untimely post-trial motions where none previously existed. As such, the opinion of the Ninth Circuit is in direct contravention of the holdings of *Hughes Aircraft* and *Chenault*.

3. Finality of Litigation.

In addition to the presumption against retroactivity articulated in *Landgraf* and *Hughes Aircraft*, there is an equally strong competing interest long settled in the law regarding the finality of litigation. *Browder v. Dept. of Corrections, supra; see also, Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541-42 (1991). By retroactively applying a civil rule to a case already completed, the Ninth Circuit has taken away the vested, substantial rights which the Petitioners had in their judgments, contrary to the dictates of *Hughes Aircraft*. The opinion below, "much like extending a statute of limitations after the pre-existing period of limitations has expired, impermissibly revives a moribund cause of action, see, *e.g., Chenault v. U.S. Postal Service*, 37 F.3d 5353, 537, 539 (CA 9, 1994)." *Hughes*

Aircraft, 138 L.Ed.2d at 146.[11] Retroactive application of the amended Rule 50 sanctions the conduct of the dilatory party at the expense of impermissibly impairing the successful litigants' vested, legal right to commence collection of their final judgments.[12]

4. "Just"; "Then pending"; "Practicable".

Applying amended Rule 50 retroactively in this case was unjust. The service requirement of the former Rule 50 and 59, spoke, in a sense, to the power of the Court, but it also spoke, more directly, to the obligations of the parties to raise, or waive, post-trial motions or objections, in a

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[11] *See also, United States v. 51 Pieces of Real Property in Roswell, NM*, 17 F.3rd 1306, 1312 (10th Cir. 1994); and *United States v. One Piper Cherokee Aircraft*, 37 F.3rd 489, 493 (9th Cir. 1994).

[12] If the applicable period of time within which one could file an appeal, 30 days, were violated by a party filing on the 31st day, and thereafter, the rule was amended to extend the applicable filing period to 45 days; could it be logically argued that an appeal filed outside of the applicable statutory time would be revived by the amended federal rule? What if Rule 50 had been amended differently, such that the 10 day time limit were shortened to 5 days. Assume that GE had timely served its Rule 50 motions within the 10 day time frame then permitted. Can it be logically argued that the amendment of Rule 50 a year and a half after the efforts to preserve the post-trial motions were made should be applied retroactively to result in a conclusion that the motions were untimely served? Given that *Hughes Aircraft, supra*, holds that amendments affecting jurisdiction may be applied prospectively only and may not, as was done in this case, be used in a retroactive manner so as to impair substantive rights of parties, an amended rule should no more be applied retroactively to revive jurisdiction already lost than it should to deprive a court of jurisdiction rightfully present.

timely manner. It created a bright line for when and how the non-moving party's rights to final judgment vest. Just as a subsequent amendment to a statute of limitation will not revive a time-barred claim,[13] subsequent amendment of a rule of civil procedure should not revive time barred post-trial motions. This is especially true in light of the substantive, vested rights of Petitioners in this case to their judgments, which had become final once the trial court lost jurisdiction to entertain the untimely served post-trial motions.

The Ninth Circuit's finding of no prejudice to Schudel and others in the case by its retroactive application of amended Rule 50 belies the facts. Petitioners were deprived of a substantive right to substantial verdicts awarded after a 54-day jury trial and 9 days of jury deliberation. That right was taken by the trial court lacking jurisdiction based upon ill-preserved motions by GE. Only the application of amended Rule 50 makes this unjust result possible. In essence, the Ninth Circuit rewarded GE for non-compliance with the rules then in effect while simultaneously destroying the vested right of Schudel in their judgments.

A case in the posture of this case was not a civil case "then pending" as of December 1, 1995, as contemplated by this Court's order amending the rule. Because untimely post-trial motions resulted in no tolling of the

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[13] *See also, Bulgo v. Munoz*, 853 F.2d 710, 715 (9th Cir. 1988) (declining to give retroactive effect to amendment of statutes of limitations which would have revived plaintiff's barred claim); *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 (9th Cir. 1975), *cert. den'd*, 429 U.S. 1090, (1977) (general rule that subsequent extensions of statutory limitation period will not revive a claim previously barred).

time within to file an appeal, and no filing of a notice of appeal occurred within 30 days of judgment, Petitioners' judgments were final and vested. Jurisdiction of the courts over this case other than for purposes of collection proceedings had expired – the case was over, not pending, in December of 1995 when the new rule was effective.

Looking at the word "practicable", as used in this Court's order, it also was chosen, presumably, so that trial and appellate courts would *not* try to retroactively apply the amendments to revive or recreate trial court jurisdiction already lost. "Practicable" is defined to mean "capable of being done, feasible . . . " in The New Lexicon Webster's Encyclopedic Dictionary of the English Language, 1989 Ed. *Browder, supra,* and other cases make it clear that missing such a deadline ends the trial court's jurisdiction. The amended rule cannot feasibly be applied retroactively where the trial court's jurisdiction had ended a year and five months previously. Retroactive application of the amended rule here was something "capable of being done" only by throwing out any concern for the principle of finality of judgments that this Court has so diligently protected. In a discussion of a different rule where *certiorari* was denied because of substantially different and distinguishable facts, Justice Rehnquist stated:

> I would therefore grant a writ of certiorari in this case and reverse the Court of Appeals' decision. The Federal Rules of Appellate Procedure govern all cases on appeal in the federal system, and patchwork exceptions to them will do far greater harm to the system than an occasional random departure on a point of substantive law.

See, dissenting opinion of Justice Rehnquist in *Needham v. White Laboratories, Inc.*, 454 U.S. 927 at 932 (1981).

The Ninth Circuit Court of Appeal's decision is in direct conflict with this Court's decisions in *Landgraf* and *Hughes Aircraft* and also is in conflict with decisions within its own circuit (see *Chenault v. U.S. Postal Service, supra*).

B. *DAUBERT*

1. Need for Clarification Among the Circuits.

This Court's decision in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) has been the subject of a remarkable amount of appellate litigation. In the federal system alone there is obviously a vast difference of opinion between not only different panels of the Ninth Circuit, but a vexing debate amongst justices writing opinions in other circuits as well, concerning how *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993),[14] was meant to influence the admissibility of expert witness opinions. Put simplistically, on one hand, there are what could be called the followers of the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir.) ("*Daubert II*"), *cert. denied*, ___ U.S. ___, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995) line of thinking,[15] that the admission of expert testimony is considerably more *difficult* given the Supreme Court's decision in *Daubert* (see *Daubert II*). On the other, different judges and appellate panels employ a

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[14] Hereinafter simply "*Daubert*"; references to the Ninth Circuit's second opinion issued in 1995 will be to "*Daubert II*".

[15] Such as the decision below, *Schudel v. General Elec. Co., supra*. Another example consistent with this more restrictive view is *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (1994).

more expensive reading of *Daubert*, an example of which can be seen in *Hopkins v. Dow Corning Corp.*, 33 F.2d 116 (9th Cir. 1994),[16] concluding that it was the Supreme Court's opinion that expert testimony should be more *easily* admitted.[17] Williams contends that under either interpretation of *Daubert* the trial court in her case correctly exercised its discretion in concluding that her expert testimony met the test. But a decision in this case from this Court on what was intended in *Daubert* would greatly assist both trial and appellate courts in making more uniform decisions on the admissibility of expert opinions and would clarify this Court's intentions in this area.

Certiorari in this case should be granted because the proper standard of review was not employed in this appeal, as will be next discussed, and as this case presents an opportunity for this court's continuing refinement and clarification of *Daubert*.

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[16] By way of another example, see *Ambrosini v. LaBarraque*, 101 F.3d 129 (D.C. Cir. 1996) and other cases later discussed herein.

[17] As of the July 1997 Supplement to 60 Am.Jur. Trials 1, in an article entitled *The Daubert Challenge to the Admissibility of Scientific Evidence*, no less than 120 articles are identified as arising out of legal periodicals and references concerning *Daubert*. A glimpse even at only the titles of some of these law review articles and other papers reveals the disparate perceptions which the varying authors have of what *Daubert* and its progeny have meant for litigators in the tort field, *e.g.*, at the two extremes, are Davis, *Admissibility of Expert Testimony After Daubert and Foret: A Wide gate, A More Vigilant Gatekeeper*, 54 La.L.Rev. 1307 (May 1994), as contrasted with Maliver, *Out of the Fryeing Pan and Into Daubert: Trial Judges at the Gate Will Not Spell Relief for Plaintiffs*, 56 U.Pitt.L.Rev. 245 (Fall 1994).

2. Appropriate Standard of Review.

The appellate court's opinion, filed on July 23, 1997, was written before this court's opinion in *General Elec. Co., v. Joiner, supra,* was issued. In *Joiner,* this Court held:

> *[A]buse of discretion* is the proper standard by which to review a District Court's decision to admit or exclude scientific evidence.

118 S.Ct. at 519 [emphasis added].

The Ninth Circuit's discussion of the sufficiency of Petitioner Williams' experts' opinions on causation fails to identify what standard of appellate review is being undertaken. The Ninth Circuit's failure to employ an "abuse of discretion" standard of review is perhaps understandable in light of the fact that *Joiner* was not decided until some five months later, but the failure to employ the proper appellate standard on review of the District court's decision to admit the experts' opinions resulted in prejudical error in Petitioner Deborah Williams' case.

3. No Deference Shown Trial Court.

This Court in *Daubert* several times emphasized that the inquiry envisioned by Rule 702 is a flexible one. *Daubert,* 509 U.S. at 593, 594, 597. Such flexibility for the trial court's exercise of its assignment, mandated by Rule 702, corroborates the need for an appellate tribunal reviewing the trial court's rulings to give substantial deference to the district court's rulings.

> [W]e adopted deferential review to afford the District Court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization.

Koon v. United States, 116 S.Ct. 2035, 2047 (1996). What a provision such as Rule 702 embodying trial-court discretion does not contemplate is for a court of appeals to "substitute its own judgment for that of the District Court." *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 257 (1981) [forum non conveniens determination]; *see also, Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir.) [exclusion of hearsay and/or Rule 803 reviewed], *cert. den.*, 117 S.Ct. 480 (1996). Admissibility rulings commonly require the court to make "fact-intensive, close calls." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

A long history of appellate rulings on a variety of issues has reaffirmed the broad extent of deference due the trial judge's ruling under an abuse of discretion standard. *Stillwell and Bierce Manufacturing Company v. Phelps*, 130 U.S. 520, 527 (1889); *Congress and Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879); *Chateaugay Ore and Iron Co. v. Blake*, 144 U.S. 476, 484 (1892). *See also, e.g., Gila Valley G. and N. R. Co. v. Hall*, 232 U.S. 94, 103 (1914); *Inland and Seaboard Coasting Company v. Tolson Company*, 139 U.S. 551, 559 (1891); *Montana Ry. v. Warren*, 137 U.S. 348, 353 (1890); *cf., Spiller v. Atchison, T. and S.F.R. Co.*, 253 U.S. 117, 130 (1920).

Despite the plethora of federal appellate and Supreme Court decisions which emphasize the wide discretion, if not the "great latitude" which must be accorded the trial court's decision,[18] the Ninth Circuit in this case ignored the trial judge's ruling and undertook

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[18] *See, United States v. Dorsey*, 45 F.3d 809, 813-14 (4th Cir.), *cert. denied*, 115 S.Ct. 2631 (1995); *Gier v. Educational Service Unit*, 66 F.3d 940, 942-4 (8th Cir. 1995); *Duffee v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996).

its own abbreviated analysis of Dr. Morton and Dr. Goldstein's opinions expressed during the trial. In this case, the trial judge had the better opportunity to take into consideration not only the trial testimony, but all the affidavits and other related evidence submitted by Petitioner Williams and others in support of her experts' testimony. The trial judge had a better opportunity to see and hear the experts and other witnesses testify, to see the pretrial and trial exhibits as they were each introduced and throughout the continuation of the case, to review and absorb much more than just the cold appellate record, and to properly employ the *Daubert* standard with respect to reliability.

4. Offers of Proof, Recognized Methodology Ignored.

The Ninth Circuit made no reference to Dr. Morton, Goldstein and Milhelm's extensive Offers of Proof filed prior to trial in response to GE's motion in limine brought under *Daubert*. *See, Schudel*, 120 F.3d at 996-7. They should have been given careful consideration by the appellate court for two reasons. First, the role of the trial court was that of a "gatekeeper." *Daubert v. Merrell Dow Pharm., supra*, 113 S.Ct. at 2798, 125 L.Ed 2d at 485. To properly fulfill that responsibility the trial court asked for and received offers of proof from the various medical providers. Since the trial court considered these Offers of Proof, the appellate court, before trying to second guess the trial court, obviously should have also. Second, Plaintiffs were not obligated to present once again, before the jury, all of the qualifications and underlying bases of their experts' opinions in the trial testimony of each expert. Fed.R.Evid. 705. Reliance by the reviewing court upon the

trial testimony of the experts alone, without consideration of the underpinnings set forth in the totality of the Offers of Proof, is contrary to *Daubert* itself as well as to Fed.R.Evid. 705. This failure on the part of the appellate court to acknowledge and consider these offers of proof compounds its failure to employ an abuse of discretion standard on review.

In his offer of proof, Dr. Morton established in great detail that he specifically followed the methodology described in peer-reviewed texts and articles cited to the trial court, and that he was well within a recognized and appropriate scientific methodology when he concluded, more probably than not, that Ms. Williams suffered from toxic encephalopathy and RADS as a result of her unprotected exposure to organic solvents at the Kaiser plant.

The appellate court below also failed to give more than passing reference to Dr. Morton's testimony that the study of other organic solvents was scientifically reliable in assisting him in making his determination of the cause of Ms. Williams' injuries, and gave no deference to Dr. Morton's use of the differential diagnosis method as his basis for determining whether the Plaintiffs were injured by the unprotected exposure to TCA and PERC.

The differential diagnosis method begins with the taking of a detailed history and physical examination and thereafter the establishment of a set of potential diagnoses that are then eliminated one by one, through additional testing and a review of literature, in order to arrive at the ultimate diagnosis. The differential diagnosis process was confirmed as a scientifically reliable process by reference to peer-reviewed articles. The method also requires the review of scientific literature and the

examination of case reports of unprotected exposures to organic solvents. Neuropsychological testing of Ms. Williams was called for by this method, and was done. Dr. Morton described three universal symptoms or neuropsychological impairments that occur from unprotected exposure to organic solvents such as TCA and PERC – memory difficulties, deficits in concentration, and pronounced irritability (sometimes described as personality change). These were symptoms reported by Ms. Williams and other Plaintiffs, and confirmed by her neuropsychological testing. Dr. Morton eliminated the other potential diagnoses and concluded after following the differential diagnosis method that Ms. Williams had suffered injuries from her unprotected exposure to TCA and PERC.

As only one part of the differential diagnosis method, Dr. Morton established that it was appropriate to make a comparison of the effects which other organic solvents are known to have on the body in analyzing the harm that is likely to occur from the organic solvents TCA and PERC. His testimony and offer of proof established that it was scientifically reliable to conclude that the organic solvents at issue were the cause of Ms. Williams' injuries, following a proper undertaking of the differential diagnosis technique and methodology outlined above. Dr. Morton was a treating physician of Ms. Williams. Where a treating expert had established that he used a reliable methodology,[19] the trial court reasonably exercised its

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[19] *Daubert* advised the trial courts to focus on the experts *methodology*, not their *conclusions*. *Daubert*, 509 U.S. at ___, 125 L.Ed.2d at 484 ["The focus, of course, must be solely on principles and methodology, not on the conclusions that they

discretion in concluding that the doctors' conclusion, reasonably and logically derived from that process, was scientifically reliable. That decision by the trial court in this case was not an abuse of discretion.

Certiorari should be granted such that this court can ensure that Ms. Williams' experts' Offers of Proof and other underlying data supporting their testimony, overlooked by the Ninth Circuit in its opinion below, are properly considered on appeal, as they were by the trial court.

5. Inconsistent with *Daubert*.

The Ninth Circuit's reliance in this case upon an alleged absence of literature concerning TCA and PERC for the specific periods of exposure, at the specific dosages suffered by Ms. Williams[20] as the sole means of overruling the trial court's admission of Dr. Morton's

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generate"]. Juries should resolve differences in the conclusions of experts, not judges. *See, e.g.*, the reasoning of the court in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 at 1535-36 (D.C. Cir.), *cert. denied* 469 U.S. 1062 (1984). *Accord, Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282, 287 (1995); *Intalco Aluminum v. Dept. Labor & Ind.*, 66 Wn.App 644, 833 P.2d 390, 398-400 (1992); *Ambrosini v. Labarraque, supra*, 101 F.3d at 137-138. *Consider also*, Seventh Amendment, U.S. Constitution; and, 28 U.S.C. Section 2072(b).

[20] The Ninth Circuit below acknowledged that there are a number of peer-reviewed articles concerning the effects of organic solvents (such as TCA and PERC) on the human body, with exposures of considerably less time but at higher doses, and at considerably longer periods of time but at considerably lower doses. There were, within the record of this case, a number of case reports contained in peer-reviewed papers that documented injuries from organic solvents of the type received by Ms. Williams and the other Plaintiffs in this exposure.

testimony, is contrary to the direct edicts of *Daubert* itself. The concept that peer-reviewed studies of the specific organic solvents used at the precise dosages are the only relevant method of evaluating scientific reliability flies in the face of existing case law and the overwhelming evidence in this case. That factor is not an exclusive nor even an essential requirement; *Daubert* itself ensured that a trial court may look to a variety of ways to test admissibility of expert testimony.[21] This Court characterized such peer review in *Daubert* as a "pertinent consideration", "*not* dispositive". 125 L.Ed 2d at 483. The Ninth Circuit obviously failed to consider that other alternative methods may suffice, as there is no analysis of any other method in its opinion below.[22]

This case is not about a drug or other chemical about which can be found no relevant literature nor any case reports demonstrating that it may possibly cause human injury [such as the birth defects as were alleged in *Daubert, supra,* and *Lust v. Merrell Dow,* 89 F.3d 594 (1996)). Ms. Williams' case is about toxic chemicals which were and are a known health hazard, and for which specific guidelines have been published by OSHA concerning safe usage of the chemicals.[23] This is a case in

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[21] "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Daubert, supra,* 509 U.S. at 593, 125 L.Ed.2d at 482.

[22] *Cf. e.g., Hopkins v. Dow Corning, supra,* in which a different Ninth Circuit panel which, on a record almost identical to the record in this case, concluded the trial court had appropriately exercised its discretion in admitting similar causation opinions concerning a different chemical.

[23] Of interest especially are GE's own publications, *Solvents and Safety, GE's Site Safety Manual,* and its own "MSDS's", which

which multiple experts testified that a "differential diagnosis" was an appropriate scientific method to resolve the causation issue.[24] These experts' opinions on the appropriateness of this procedure have been endorsed by a number of courts. *See, e.g., Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) ["we will not declare such methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients"]; *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ["faults in his use of differential etiology as a methodology, or lack of textural authority for his opinion, go to the weight, not the admissibility of his testimony"]; *Ambrosini v. LaBarraque*, 101 F.3d 129, 141 (D.C. Cir. 1996) [use of differential diagnosis is appropriate methodology]; *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996) [trial court applied too stringent a reliability test, "*Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony", citing *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996)].

6. Ninth Circuit's Opinion Inconsistent with its own Decisions, Those of Other Circuits, and State Law.

As can be seen from a review of the cases cited in the prior section, the insistence by the Ninth Circuit opinion below that there be peer-reviewed (specific to the chemical and dosage) literature that these particular organic solvents caused the harm to Ms. Williams is inconsistent

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confirmed GE knew of the very risk of harm it was creating by not protecting these workers before the exposure even occurred.

[24] Dr. Morton; Dr. Lantsberger and Dr. Goldstein.

with the fact that the methodology used by Dr. Morton has been specifically endorsed by the Ninth and other circuit courts as being scientifically reliable. *See also, Hopkins v. Dow Corning, supra.*

A different panel in the Ninth Circuit in *Lust v. Merrell Dow Pharm., Inc., supra,* concluded that an expert's opinion was held to have been properly excluded where the expert claimed that he followed a recognized minority of teratologists in reaching his conclusions. Justice Farris correctly noted:

> (Dr.) Done could have convinced the district court that his methodology was nevertheless scientific if he had explained how he went about reaching his conclusions and had pointed to an objective source demonstrating that his method and premises were generally accepted by or espoused by a recognized minority of teratologists.

89 F.3d 594, 597.

Dr. Morton's use of the differential diagnosis methodology was ***never*** contested by GE. Rather, the entire premise of GE was that without more extensive peer-reviewed literature, the opinion of Dr. Morton could not be reliable. Prior to the Ninth Circuit's decision of Ms. Williams' case even the most conservative approach to the admissibility of expert testimony did not reach that far. *Daubert II, supra,* 43 F.3d at 1318-1319. Reversal of the trial court's decision on the admissibility of the expert evidence supporting Williams' judgment in this case, where the trial court considered the expert's qualifications and extensive experience, the methodology used by the experts, and the totality of the additional research, information, studies and other bases listed in the Offers of Proof, as contrasted with the Ninth Circuit's analysis

which looked to only one subissue of that process, is inconsistent with other appellate decisions and with *Daubert*.

CONCLUSION

For the foregoing reasons these Petitioners respectfully urge this Court to grant their Petition for Certiorari.[25]

DATED this 20th day of February, 1998.

Respectfully Submitted,

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of Attorneys for Williams, Schudel, Schudel, Schudel, Glass, Thompson, and Froese

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[25] To any extent applicable, all Petitioners herein also adopt, in full, the arguments of Plaintiffs/Petitioners John and Ruth Hopkins and Plaintiff/Petitioner Merlin Carlson, Jr., insofar as questions presented, issues, arguments or authorities advanced in said parties' Petitions for Certiorari being separately filed relate to issues held in common with Petitioners herein. *See*, Rules of the U.S. Supreme Court, Rule 12(4).

David SCHUDEL, et al., Plaintiffs,

and

Deborah Guaragna-Williams,
Plaintiff-Appellee,

v.

GENERAL ELECTRIC CO., a foreign corporation; Kaiser Aluminum And Chemical Corporation, a foreign corporation, Defendants-Appellants.

David SCHUDEL; Daniel Glass; Merlin E. Carlson; Timothy Schudel; Sandra Schudel, husband and wife, and the marital community composed thereof; Kathrene Rae Howell; Craig A. Thompson; John Hopkins; Ruth Hopkins, husband and wife, and the marital community composed thereof,
Plaintiff-Appellants,

v.

GENERAL ELECTRIC CO., a foreign corporation; Kaiser Aluminum and Chemical Corporation, a foreign corporation, Defendants-Appellees.

Nos. 95-35092, 95-35145.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 8, 1996.

Decided July 23, 1997.

Joe G. Hollingsworth, Donald W. Fowler and Katharine R. Latimer, Spriggs & Hollingsworth, Washington, DC, and James B. King, Keefe, King & Bowman, Spokane, WA, for defendants-appellants-cross-appellees.

Craig F. Schauermann, Schauermann & Thayer, Vancouver, WA, and Marcia M. Meade, Dawson & Meade,

Spokane, WA, for plaintiffs-cross-appellants David Schudel, Timothy Schudel, Daniel Glass, Sandra Schudel, Merlin Carlson, Kathrene Howell, and Craig Thompson.

Thomas C. Phelan, Vancouver, WA, for plaintiffs-cross-appellants John and Ruth Hopkins.

Craig F. Schauermann, William K. Thayer, and David I. Gedrose, Schauermann & Thayer, Vancouver, WA, for plaintiff-appellee Deborah Guaragna-Williams.

Kit A. Pierson, Jenner & Block, Washington, DC, for amicus curiae.

Appeals from the United States District Court for the Eastern District of Washington; Fred Van Sickle, District Judge, Presiding. D.C. No. CV-92-00081-FVS.

Before BROWNING, D.W. NELSON, and FERNANDEZ, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

This diversity case involves claims for damages from negligence and loss of consortium against defendants General Electric Company and Kaiser Aluminum and Chemical Corporation. Kaiser contracted with General Electric to clean up polychlorinated biphenyls (PCBs) at Kaiser's Trentwood facility in Spokane, Washington. Nine of the ten plaintiffs were employed by General Electric on the cleanup.[1] These plaintiffs alleged they developed various neurological and respiratory problems from

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[1] The tenth plaintiff, Sandra Schudel, did not work at the site, but asserted a loss of consortium claim as the wife of plaintiff Tim Schudel.

exposure to two cleaning solvents, trichloroethane (TCA) and perchloroethylene (Perc).

A jury returned verdicts for the plaintiffs. The defendants moved for JNOV or new trial. The district court affirmed the verdict in favor of one plaintiff, Deborah Williams. The court granted JNOV with respect to respiratory injuries[2] asserted by Merlin Carlson ("Carlson") and with respect to neurological injuries[3] asserted by Kathrene Froese, John Hopkins, and Ruth Hopkins ("the Froese plaintiffs"). The court ordered a new trial with respect to injuries of Carlson and the Froese plaintiffs as to which JNOV had not been granted. Finally, the court granted JNOV on all claims asserted by the five remaining plaintiffs ("the Schudel plaintiffs"[4]).

Defendants appeal the verdict in favor of plaintiff Williams. The other plaintiffs appeal the granting of motions for JNOV or new trial. We address four issues: (1) whether the district court had jurisdiction over the defendants' motions for JNOV or new trial; (2) whether we have jurisdiction to review the district court's order for JNOV and new trial as to Carlson and the Froese plaintiffs; (3) whether the district court erred by granting

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[2] With respect to Carlson, the term "respiratory injuries" applies to respiratory injuries, fatigue, overall body pain, and all other alleged injuries that do not fall within the term "neurological injuries."

[3] With respect to these plaintiffs, the term "neurological injuries" applies to neurological injuries, headaches, rashes, and all other alleged injuries that do not fall within the term "respiratory injuries."

[4] David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson.

JNOV against the Schudel plaintiffs without considering expert testimony the court concluded after trial had been erroneously admitted; and (4) whether the district court properly admitted expert testimony on behalf of plaintiff Williams.

I. District Court Jurisdiction Over the Defendants' Motions for JNOV or New Trial

Plaintiffs argue the district court lacked jurisdiction to consider defendants' motions for JNOV or new trial because the motions were not properly served.[5] When the motions were filed, Federal Rules of Civil Procedure 50 and 59 required the defendants to both file and serve such motions within ten days after entry of judgment.[6] Defendants filed the motions and delivered them to Federal Express for service on the tenth day after judgment. While personal delivery or delivery to the U.S. Postal Service would have satisfied the service requirement, delivery to Federal Express did not. *Magnuson v. Video Yesteryear,* 85 F.3d 1424, 1431 (9th Cir.1996).

Rules 50 and 59 were amended in 1995, however, to require only that such motions be filed, not served, no later than 10 days after entry of judgment. *See* Fed.R.Civ.P. 50(b), 59(b). The amendments took effect

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[5] Plaintiff Carlson does not raise this issue; his attorney was timely served.

[6] *See* former Fed.R.Civ.P. 50(b) ("Such a motion [for judgment as a matter of law] may be renewed by service and filing not later than 10 days after entry of judgment."); former Fed.R.Civ.P. 59(b) ("A motion for a new trial shall be served not later than 10 days after the entry of judgment.").

December 1, 1995, and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." S.Ct. Order, Amendments to the Federal Rules of Civil Procedure (Apr. 27, 1995).

This proceeding was pending on December 1, 1995, and no prejudice will result from application of the amendments. All parties have briefed the substantive, non-jurisdictional arguments in detail. No additional action on the part of the court or the parties is required to proceed. We have applied amended federal rules of appellate procedure retroactively in similar circumstances, *see Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir.1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir.1994), and do so here.

II. Appellate Jurisdiction Over Order Granting JNOV and New Trial to Carlson and the Froese Plaintiffs

The district court granted JNOV with respect to respiratory injuries allegedly sustained by Carlson and with respect to neurological injuries allegedly sustained by the Froese plaintiffs. The court vacated the verdicts for these plaintiffs on the ground that they were "tainted" by the evidence of the injuries as to which JNOV had been granted, and ordered a new trial as to Carlson's neurological injuries and the Froese plaintiffs' respiratory injuries. The court certified appeals from the orders for new trial pursuant to Federal Rule of Civil Procedure 54(b).[7]

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[7] Under Fed.R.Civ.P. 54(b), when a lawsuit involves multiple claims or multiple parties, a district court "may direct

We have jurisdiction to review final judgments on entire claims, not on individual issues. An order adjudicating only one issue that is not determinative of an entire claim is not appealable even if a district court certifies the order under Rule 54(b). *Arizona State Carpenters Pension Trust Fund v. Miller,* 938 F.2d 1038, 1039 (9th Cir.1991). We must determine independently whether a certified judgment is final as to a particular claim.[8] *Id.*

Litigants who advance a single legal theory of liability applied to one set of facts allege a single claim. *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 743, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976). Carlson and Froese alleged a single claim of negligence, not separate claims for neurological injury and respiratory injury. Similarly, the Hopkinses alleged claims for negligence and loss of consortium, not separate claims for neurological injury and respiratory injury as to each claim.

The district court granted JNOV as to issues related to certain injuries allegedly suffered by plaintiffs because of defendants' negligence. We have no jurisdiction to

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the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[8] Carlson and the Froese plaintiffs argue the standard of review is not *de novo,* but abuse of discretion. We review the certification of an appeal under Rule 54(b) for abuse of discretion. *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 797 (9th Cir.1991). Even though a decision is certified under Rule 54(b), however, we must independently ensure that we are dealing with a final judgment before exercising jurisdiction. *Arizona State Carpenters,* 938 F.2d at 1039.

review the court's rulings on these issues because the claims for negligence and the derivative claims for loss of consortium have not been finally determined. The order granting new trial is also interlocutory and not immediately appealable. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189-90, 66 L.Ed.2d 193 (1980); *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir.1985).[9]

III. Excising Testimony in Granting JNOV

The Schudel plaintiffs argue the district court erred in excising the previously admitted testimony of Dr. Paula Lantsberger before granting defendants' motion for JNOV. We agree.

Dr. Lantsberger was the only witness on causation on behalf of the Schudel plaintiffs. Dr. Lantsberger described symptoms and offered specific testimony regarding causation under two theories: a specific condition causation theory; and a "whole person aggravation" theory. The defendants filed a motion to exclude Dr. Lantsberger's causation testimony prior to trial and a motion to strike

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[9] Carlson and the Froese plaintiffs argue this court has jurisdiction to review a conditional grant of a new trial under Fed.R.Civ.P. 50(c). *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 n. 15 (9th Cir.1989) (stating that appellate courts may review conditional new trial orders because the plain language of Rule 50(c)(1) expressly permits this review). The district court ordered a new trial under Rule 50(b), not Rule 50(c)(1). The order was not conditioned on reversal of the order granting JNOV. Rule 50(b) does not provide for review of non-conditional new trial orders.

the testimony during trial. The district court did not rule on these motions.

After the jury returned verdicts in favor of plaintiffs and defendants moved for JNOV, the court held that Dr. Lantsberger's causation testimony based on the "whole body aggravation" theory had been admitted erroneously. The court then considered the sufficiency of the remaining evidence to support the jury verdicts and granted the motion for JNOV. The court denied defendants' alternative request for a new trial.

Four circuits have held that, when deciding a motion for JNOV, a trial court may not ignore evidence erroneously admitted at trial, reasoning that excluding evidence after the verdict is unfair to a party who may have relied on the determination that the evidence was admissible.[10] "If evidence is ruled inadmissible during the course of the trial, the plaintiff has the opportunity to introduce new evidence. However, when that evidence is ruled inadmissible in the context of deciding a motion for JNOV, the plaintiff, having relied on the evidence already

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[10] *See Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir.1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir.1992); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir.1983); *Midcontinent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir.1973). The Third Circuit has held that such exclusion is proper as long as other evidence relating to the same issue was not barred during trial as cumulative, reasoning that the moving party has a competing interest in litigating a case only once and expressing doubt that litigants would hold back significant evidence at trial. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1199-1200 (3d Cir.1993).

introduced, is unable to remedy the situation." *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir.1993).

We recently indicated we would abide by the same rule. *See Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 993 (9th Cir.1997). We now hold that when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing. *Jackson*, 980 F.2d at 696 n. 4.

The district court properly concluded that Dr. Lantsberger's testimony based on the "whole person aggravation" theory of causation did not meet the standard of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (*Daubert I*), (outlined in Part IV of this opinion), and should have been excluded. Once the jury rendered its verdict based on the improperly admitted evidence, however, the district court erred in excising that evidence when ruling on the motion for JNOV. Considering all the evidence admitted at trial, including Dr. Lantsberger's "whole person aggravation" theory testimony, we conclude there was sufficient evidence to support the jury verdicts in favor of the Schudel plaintiffs.

Nonetheless, these verdicts may not stand. The district court erred in denying defendants' motion for new trial. A new trial should be granted when the erroneous admission of evidence affected the substantial rights of the parties. Fed.R.Civ.P. 61. Dr. Lantsberger's testimony was the only evidence of causation; its erroneous admission was undoubtedly prejudicial.

IV. The Defendants' Appeal

Defendants argue the neurological symptom causation testimony of Dr. William Morton, Dr. Daniel Goldstein, and Dr. Lantsberger underlying the jury verdict for Deborah Williams was not admissible under Federal Rule of Evidence 702.[11]

A.

The Supreme Court held in *Daubert I*, 509 U.S. at 590-91, 113 S.Ct. at 2795-96, that Rule 702 requires the trial judge to determine that proposed scientific expert testimony will be both reliable and relevant. *See also Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1313 (9th Cir.1995) (*Daubert II*).

Scientific knowledge is reliable if it is "ground[ed] in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation."

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[11] Defendants also argue the trial court should have held a pretrial hearing on the admissibility of the testimony of Williams' experts. Because we conclude the expert testimony should have been excluded, we do not decide whether a pretrial hearing should have been held.

Daubert I, 509 U.S. at 590, 113 S.Ct. at 2795. In determining reliability, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595, 113 S.Ct. at 2797.

Evidence of scientific knowledge is relevant if the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593, 113 S.Ct. at 2796; *see also Daubert II*, 43 F.3d at 1315 (evidence of scientific knowledge must "logically advance[ ] a material aspect of the proposing party's case"). A court's determination of relevance must consider the applicable substantive standard. *See id.* at 1320. Under Washington tort law, a plaintiff must show that the "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wash.2d 814, 440 P.2d 823, 830 (1968). This is virtually the same as the standard under California tort law applied in *Daubert II*. *See* 43 F.3d at 1320. Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries, i.e., that use of the drug more than doubled the likelihood the injuries would occur. 43 F.3d at 1320-22.

B.

The district court approved reliance by Williams' experts on interview data collected by Diane Nebel.

Nebel contacted many of the workers at the Kaiser facility after one of the project supervisors fell ill with Legionnaire's disease. Nebel found no evidence of a Legionnaire's outbreak, but did discover that some of the workers, including the plaintiffs, suffered from various medical symptoms. The data collected in Nebel's Legionnaire's disease investigation provided the basis for much of the scientific testimony presented by Williams' experts at trial.

The district court acted within its discretion in approving the use of this data by Williams' expert witnesses. Dr. Goldstein and Dr. Lantsberger both testified the data was of the type toxicologists consider reliable and regularly rely upon. *See* Fed.R.Evid. 703.

Dr. Morton testified that plaintiff Williams suffered from solvent-induced toxic encephalopathy which "more probably than not" was caused by exposure to Perc and TCA. Dr. Morton's testimony met *Daubert*'s relevance requirement. However, it did not meet *Daubert*'s requirement of reliability.

Dr. Morton's conclusions were based on extrapolation from studies that: (1) involved organic solvents other than TCA or Perc; and (2) examined long-term exposure at relatively low chemical concentrations or short-term exposure at very high concentrations, rather than the short-term, moderate-level exposure sustained by Williams. Dr. Morton did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed, the testimony indicated small differences in molecular structure often have significant consequences.

As to differences in length and intensity of exposure, the district court erroneously reasoned that because there was evidence that acute exposure to TCA and Perc can cause toxic encephalopathy, whether Williams' exposure was sufficient to cause her symptoms was a question for the jury. Williams' exposure was neither long enough nor intense enough to fall within the ranges described in the studies Dr. Morton relied upon. Extrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.[12]

Dr. Goldstein's testimony suffered from similar deficiencies. Dr. Goldstein conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic. He also testified that it would be improper to infer conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents, and that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship.

Dr. Goldstein acknowledged that the biochemical mechanism of neurotoxicity from TCA and Perc has not been demonstrated. Only two studies cited by Dr. Goldstein involved TCA and Perc, and neither met *Daubert* standards. The Altman study found no relationship between exposure to Perc and the toxic encephalopathy or loss of consciousness alleged by the plaintiffs. The

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[12] Given our analysis of the admissibility of Dr. Morton's testimony, we need not consider defendants' contention that his testimony should have been excluded because testimony based on case reports is not admissible under *Daubert*.

Kalifant study involved long-term (7-15 years), repetitive exposures to TCA at high levels.

Dr. Lantsberger's testimony failed to meet *Daubert* 's relevance requirement. She testified it was only a "possibility," not a "probability," that Williams suffered organic brain damage from exposure to solvents at the facility. Dr. Lantsberger admitted she could not testify to a specific cause and effect relationship between Williams' exposure and health problems. She relied instead on a "whole person aggravation" theory without establishing that the theory had a scientific basis.

Dr. Lantsberger's testimony regarding the hazards of TCA and Perc was inadmissible under *Daubert*. Dr. Lantsberger, like Dr. Goldstein, relied on the Altman and Kalifant articles to reach her neurotoxicity conclusions, and like Dr. Goldstein, admitted that medical science has not determined the effects of short-term exposure to the solvents involved.

Plaintiff Williams points to other expert witnesses whose testimony was not challenged by defendants. Only one of these experts provided causation testimony, and his testimony related only to Williams' respiratory injury.

Considering all the evidence admitted at trial, including the erroneously admitted evidence, we hold the district court properly denied defendants' motion for JNOV with respect to Williams. Admission of the challenged expert testimony was prejudicial, however, because it was the sole causation evidence with respect to Williams' neurological symptoms. Accordingly, we vacate the judgment entered on the jury verdict, reverse the district

court's denial of defendants' motion for a new trial, and remand.

CONCLUSION

We lack jurisdiction to review the district court's grant of JNOV and new trial as to plaintiffs Merlin Carlson, Kathrene Froese, John Hopkins, and Ruth Hopkins, and DISMISS their appeals.

We REVERSE the grant of JNOV and the denial of the motions for new trial as to plaintiffs David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson, and REMAND.

We find plaintiff Deborah Williams' neurological expert testimony on causation inadmissible, VACATE the judgment entered on the jury verdict in her favor, REVERSE the denial of the motion for new trial, and REMAND.

DISMISSED in part, and VACATED, REVERSED, and REMANDED in part. No costs allowed.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID SCHUDEL, et al., Plaintiffs, and DEBORAH GUARAGNA-WILLIAMS, Plaintiff-Appellee, v. GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation, Defendants-Appellants.	)	No. 95-35092 D.C. No. CV-92-00081-FVS

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON, TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; RUTH HOPKINS, husband and wife, and the marital community composed thereof, Plaintiffs-Appellants, v. GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation, Defendants-Appellees.	No. 95-35145 D.C. No. CV-92-00081-FVS ORDER (Filed Nov. 24, 1997)

Before: BROWNING, D.W. NELSON, and FERNANDEZ, Circuit Judges

The petition for rehearing of Merlin E. Carlson, Jr. is DENIED.

The panel has voted to DENY the petition for rehearing of David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Deborah Williams, and Kathrene Froese. Judge Browning and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The panel has voted to DENY the petition for rehearing of John Hopkins and Ruth Hopkins. Judge Browning

and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al, et ux, Plaintiffs, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendants.	No. CS-92-081-FVS ORDER RE POST-TRIAL MOTIONS (Filed Nov. 25, 1994)

BEFORE THE COURT are certain post-trial motions. They were decided without oral argument on November 22, 1994. *See* Local Rule ("LR") 7(h)(3).

I. PLAINTIFFS' MOTION TO STRIKE

A. Background

Judgment was entered on July 13, 1994. On July 27, 1994, the defendants filed motions for both judgments as a matter of law and a new trial. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59. That same day, copies of the motions were mailed to opposing counsel via Federal Express.

The plaintiffs now move the Court to strike the defendants' Rule 50(b) and Rule 59 motions. They argue that the motions were not served in a timely manner.

B. Ruling

Motions for judgment as a matter of law and for a new trial must be filed and served within ten days of the date judgment is entered. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59(b). In calculating the ten-day deadline, neither intermediate weekends nor legal holidays are counted. Fed.R.Civ.P. 6(b). Thus, the defendants had until the twenty-seventh of July to file and serve their Rule 50(b) and Rule 59 motions.

It is undisputed that the defendants mailed copies of their motions to all opposing parties by Federal Express on July 27, 1994. Since "[s]ervice by mail is complete upon mailing," Fed.R.Civ.P. 5(b), the defendants' motions would appear to have been both filed and served prior to the deadline.

The plaintiffs disagree. They contend that sending documents by Federal Express does not constitute "mailing" within the meaning of Rule 5(b).

Notwithstanding the plaintiffs' disagreement, they have failed to cite a single decision adopting their interpretation of Rule 5(b). They are forced to rely upon *Transco Leasing Corp. v. United States*, 992 F.2d 552, 554 n.2 (5th Cir. 1993), a case in which the Fifth Circuit cautioned, in dicta, "that service by Federal Express may not be service by mail."[1]

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[1] Professors Wright and Miller mention *Transco*, but do not analyze the issue. 4A C. Wright, A. Miller, *Federal Practice and Procedure*, § 1148 (2d ed. Supp. 1994).

The defendants, by contrast, have cited two district courts decisions that considered – and rejected – the plaintiffs' position. Both held that Rule 5(b) does not require mailing through the United States Postal Service. *United States v. Certain Real Property & Premises Known As 63-29 Trimble Rd.*, 812 F.Supp. 332, 334 (E.D.N.Y. 1992); *Edmond v. United States Postal Serv.*, 727 F.Supp. 7, 11 (D.D.C. 1989), *rev'd on other grounds*, 949 F.2d 415 (1991).

Here, it was reasonable for the defendants to believe that the method of service they utilized would be more prompt than ordinary first class mail, and every bit as reliable. Given the plaintiffs' failure to cite authority supporting their interpretation of Rule 5(b), and the fact that two district courts have specifically rejected their position, the plaintiffs' motion to strike will be denied.

II. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW.

The defendants offer six reasons why the Court should grant judgment as a matter of law. Fed.R.Civ.P. 50(b). They are as follows: (1) the plaintiffs' experts based their opinions upon unreliable data; (2) certain experts were not qualified, and their opinions do not constitute "scientific knowledge" within the meaning of Rule 702; (3) even if the disputed opinions are admissible, they fail to establish causation; (4) under Washington law, many of Dr. Lantsberger's opinions regarding causation are legally insufficient; (5) the plaintiffs were loaned servants; and (6) Kaiser owed no duty of care to the plaintiffs.

A. Reliability/Loaned Servant/Duty

Not all of the defendants' arguments require in-depth analysis. The first, fifth, and sixth may be disposed of rather quickly.

1. Reliability of Data

The Court refused to admit the "Nebel" exhibits because they were hearsay, and the plaintiffs had not demonstrated the applicability of an exception to the hearsay rule. Moreover, even if an exception had applied, the exhibits were cumulative. (Tr. at 5790-91).

Later, the defendants attempted to impeach Craig Thompson with statements he made to Ms. Nebel. *See* Fed.R.Evid. 801(d)(2)(A) (admission by party-opponent). The plaintiffs objected. (Tr. at 5970.) In sustaining the objection, the Court said, in part, "They [the Nebel exhibits] were not admitted because of concerns about reliability." (Tr. at 5984.)

The defendants have interpreted the court's statement as a finding that the Nebel exhibits were unreliable. When both sections of the transcript are read in context, it is evident that no such finding was intended.

2. Loaned Servant

The jury was instructed properly on the question of "loaned servant." Since there is substantial evidence to support the jury's determination that the plaintiffs were not loaned servants, there is no basis for granting the defendants judgment on this issue.

3. *Duty of Care*

With Respect to the question of "duty," the defendants have cited no new authority. The Court is satisfied that a duty existed.

B. Admissibility of Certain Expert Opinions

The second argument focuses on the admissibility of opinions given by Drs. Lantsberger, Goldstein, and Morton. The defendants submit that these three witnesses were not qualified to render opinions regarding toxic encephalopathy, and that their theories of organic brain damage are not supported by the scientific literature.

Both prongs of the second argument were raised prior to (and during) trial. After reviewing the materials presented by the parties, the Court ruled against the defendants on both issues.

Since then, the Ninth Circuit has decided two civil cases, the outcome in each hinging on the admissibility of expert testimony. Both opinions discuss the requirements of Rule 702 in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Both agree that expert testimony may not be admitted unless the trial judge first determines that the expert's conclusions are based upon scientific knowledge. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124 (9th Cir. 1994); *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

Although *Hopkins* and *Claar* are clearly relevant here, neither dictates a result different than that previously

reached by the Court. As a result, the Court declines to disturb its prior rulings regarding toxic encephalopathy.

C. Sufficiency of Certain Expert Opinions (Background)

The third and fourth arguments challenge the sufficiency of certain expert opinions – primarily those of Dr. Lantsberger. Because this part of the defendants' Rule 50(b) motion attacks sufficiency, it is necessary to describe the disputed opinions in some detail.

1. Dan Glass

Mr. Glass reported a number of symptoms to Dr. Paula Lantsberger, including heart palpitations, headaches, memory loss, and respiratory problems. Dr. Lantsberger was the only expert who attempted to link any of Glass' specific symptoms to work at Kaiser.

(a) Deposition Testimony

During a deposition in November, 1993, Dr. Lantsberger testified that she "just [didn't] know what caused [the heart palpitations]." (Tr. at 2317.)

With respect to a headache Glass complained of during May, 1990, Dr. Lantsberger testified that "it was probably a more migrainous type of headache and that it's probably not [related] to his exposure." (Tr. at 2325.)

Dr. Lantsberger was asked the following question regarding a headache Glass reported during September, 1991. "[I]s it true that the headache that he complained of

when you last saw him is unrelated to his industrial exposure at Kaiser?" (Tr. at 3180.) "True," she replied. *Id.*

Dr. Lantsberger was asked what factors she had considered in determining whether Glass' brain had been injured during the cleanup. They included "his function and his performance since working at Kaiser," "the absence of any objective, neurologic findings," and "the literature on mixed organic solvents." (Tr. at 3181.) Having considered those factors, she was asked whether it was true that she had concluded "that [Dan Glass] did not sustain brain damage as a result of working at Kaiser in 1988." *Id.* "Correct," she said. *Id.*

Finally, Dr. Lantsberger was asked to review a report prepared by Dr. Patricia Sparks, a board-certified specialist in occupational medicine. (Dr. Sparks had examined Mr. Glass at the request of Washington's Department of Labor and Industries.) In her report, Dr. Sparks had said "that there is no respiratory, neurological or mental impairment resulting from [Glass'] previous exposures on a more probable than not basis." (Tr. at 2350.) Dr. Lantsberger was asked whether she agreed with that statement. Once again, her response was, "Correct." *Id.*

(b) Direct Examination

Dr. Lantsberger's testimony at trial was dramatically different. She now said that it was probable that Glass had a pre-existing lung condition which had been aggravated by "exposure to chemicals." (Tr. at 1893.) She now assumed that Glass' headaches were related to the exposure. (Tr. at 1895.) She now opined "that there may be a relationship between his heart symptoms while working

on the site and his exposure to the chemicals." (Tr. at 1897.) Finally, in apparent reference to allegations of memory loss and difficulty in concentrating, she now said "that the symptoms that [Glass] was complaining of that had been a change over his base line would be related to his exposures." (Tr. at 1899.)

(c) Cross-examination

Dr. Lantsberger testified that she first examined Dan Glass during October, 1989, approximately ten months after the cleanup project. He did not complain of respiratory problems. (Tr. at 2288.) His examination was essentially normal. (Tr. at 2298.) He had normal pulmonary functions. (Tr. at 2305-06.) At that point, Dr. Lantsberger did not diagnose any respiratory injury or disease. (Tr. at 2312.)

Glass next went to Dr. Lantsberger during May, 1990. Once again, he neither mentioned respiratory problems, nor did Dr. Lantsberger diagnose any. (Tr. at 2326.) Glass did complain of headaches. However, during cross examination, Dr. Lantsberger conceded that she could not say there was a specific cause-and-effect relationship between his industrial exposure and the headaches he described. (Tr. at 2326.)

Dr. Lantsberger's last examination of Mr. Glass occurred during September, 1991. (Tr. at 2333.) At that time, he made no mention of respiratory problems. *Id.* He did, however, report headaches and memory loss. (Tr. at 2332.)

With respect to the former, Dr. Lantsberger again conceded that she was unable to find a cause-and-effect relationship between Glass' work at Kaiser and the headaches he mentioned. (Tr. at 2334.) With respect to the latter, Dr. Lantsberger's answers were somewhat coy. Nevertheless, when pressed by defense counsel, she finally acknowledged that she agreed with two other experts who had reported that Glass had no neurological or psychological impairment as a direct result of his work at Kaiser. (Tr. at 2347-52.)

(d) First Redirect Examination

On redirect, Dr. Lantsberger said that she thought Mr. Glass had experienced an "alteration in his level of consciousness" while working at Kaiser. (Tr. at 3099.) She did not, however, attempt to link that phenomenon with a specific injury.

Later, Dr. Lantsberger was asked whether it made "scientific sense" to determine whether each condition Mr. Glass' complained of could be attributed to work at Kaiser. (Tr. at 3138.) She denied that it did, insisting that "you have to look at the patient as a whole." *Id.*

Insofar as her prior testimony was concerned, Dr. Lantsberger said, "I was trying to indicate that as a specific, isolated, single, sole source cause, no, I couldn't ascribe things as each individual cause. I had to take them as a whole and as an aggregate group of, aggregate group of people, to provide the data I needed to develop my opinions." *Id.*

(e) First Recross/Second Redirect

During First Recross, Dr. Lantsberger was impeached with her prior deposition testimony. (Tr. at 3179-81.) In an effort to rehabilitate her, counsel for the plaintiffs attempted to show that the statements quoted by defense counsel referred to an examination requested by the Department of Labor and Industries. Plaintiffs' counsel implied that in the context of a Labor and Industries examination, a finding of "impairment" must be based upon certain limited objective factors. (Tr. at 3203-06.)

At best, the effort at rehabilitation was only partially successful. As noted above, it is clear that the opinion which Dr. Lantsberger gave during her deposition (*i.e.*, that Mr. Glass had sustained no brain damage) was based upon both subjective and objective factors. (Tr. at 3181.).

2. David Schudel

Mr. Schudel has been examined by Dr. Lantsberger on a number of occasions. Although Schudel described a number of symptoms, there were (at most) two medical conditions which Lantsberger was willing to say were more probably than not caused by his work at Kaiser. One was a sensitization to odors; the other was an "aggravation" of his "whole person."

(a) Deposition Testimony

David Schudel had been tested by psychologists Paul Domitor and Lloyd Cripe. Having reviewed that testing, Dr. Lantsberger was asked whether it was her "medical opinion that Mr. [David] Schudel does not have brain

damage as a result of his industrial exposure at Kaiser?" (Tr. at 2980.) She replied, "Correct." *Id.*

During her deposition, Dr. Lantsberger described Schudel's reaction to odors as a "conditioned response." (Tr. at 2989.) She explained it this way:

> I kind of liken it to the Pavlov's dog theory. When you put the dog, ring the bell, associate it with food, the dog salivates. You take Dave. You put him out with chemicals. You have somebody's investigation proceeding where he is seeing health effects that make him scared. Subsequently[,] he continues to be scared around chemicals.

(Tr. at 2990). Dr. Lantsberger was asked whether it was the investigation conducted by the county health department which rang the bell "and set in motion what has become – what has been a sort of cascading conditioned response from Mr. Schudel." *Id.* "Correct," she said. *Id.*

(b) Direct Examination

Dr. Lantsberger's causation testimony was interesting. When asked for the cause of "David Schudel's emotional reaction to smells," (Tr. at 1777), she said, "I think that on a reasonable medical certainty he did not have this before his initial exposure in 1988 and subsequently to that I think that it's, on a more probable than not basis, related to his initial chemical exposure in '88.") *Id.* In other words, since Schudel did not react to odors before being exposed to chemicals at Kaiser, it must be the exposure which caused the reaction.

Later, Dr. Lantsberger described certain pulmonary function tests which had been administered to Mr. Schudel after the trial was underway. (Tr. at 1840-41.) According to Dr. Lantsberger, the results indicated that Schudel's reaction to odors was not strictly psychological. (Tr. at 1841-42.)

Thereafter, Lantsberger was asked two additional causation questions. The first was "whether David Schudel's physical problems with chemicals, as far as his lungs, is in any way related to the 1988 clean-up?" (Tr. at 1843.) To this question she replied, "I do think that some of the problems that he's having with his lungs and reactions are reactions to his, his lung condition are related to his exposures in the '88 clean-up." *Id.*

As a second causation question, Lantsberger was asked "whether David Schudel would have these problems that you've identified if he was provided with adequate working protective gear in 1988?" (Tr. at 1843-44.) Ultimately, she said, "I think that if they had had respiratory protection equipment at that time frame, I don't think that he would be reacting as badly as he has now." *Id.* at 1844.

(c) Cross-examination

During the course of cross-examination, Dr. Lantsberger conceded that David Schudel does not have Reactive Airway Dysfunction Syndrome. (Tr. at 2978). She further conceded that he did not sustain brain damage while working at Kaiser. (Tr. at 2979).

Since the Kaiser project, Schudel has had numerous tests, including methacholine challenge tests, pulmonary function tests, neuropsychological tests, and chest x-rays. (Tr. at 2992.) Dr. Lantsberger acknowledged that prior to trial, none of the tests had revealed any pathology. (Tr. at 2992.) It was not until the Spring of 1994 (five and one-half years after the cleanup project) that Dr. Lantsberger was able to produce test results which "showed some alteration in pulmonary function capabilities." (Tr. at 2993-94.)

By the end of cross examination, Dr. Lantsberger had begun to back away from her earlier diagnosis. When asked whether the most recent pulmonary function test results could be described as a conditioned response, Lantsberger said, "I don't ascribe as much of that to the conditioned response now that we've got some of the other confounding variables out of the way. We've gotten the smoking out of the way, and I have data with him on a work site with nurses monitoring him on the work site." (Tr. at 3012.)

(d) Redirect

On redirect, Dr. Lantsberger twice asserted that David Schudel had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3073, 3098.) No effort was made to link Schudel's alteration of consciousness with Lantsberger's prior diagnosis.

Later, counsel for the plaintiffs asked Lantsberger whether she had been cross-examined regarding "David Schudel as . . . a whole, live person or was it to the

isolated incidences [sic] of his existence?" (Tr. at 3140-41.) The latter, Lantsberger said. *Id.*

Plaintiffs' counsel asked whether it is "scientifically sound to consider David Schudel in terms of isolated incidences [sic]?" *Id.* "No," Dr. Lantsberger said, "it is not. You have to look at him in a whole." *Id.*

Finally, counsel for the plaintiffs asked, "Would you please tell the jury if you have any opinion as to David Schudel as a whole person in relationship to his exposure to the chemicals in 1988 on a more probable than not basis?" *Id.* After an objection, Lantsberger said, "[T]aking . . . into account the totality of his information and all of the information that was presented, in an aggregate way, I think that it was more probably than not an aggravation." *Id.*

(e) First Recross/Second Redirect

During First Recross, Lantsberger again admitted that Schudel sustained no brain damage from working on the cleanup. (Tr. at 3189.) During Second Redirect, Lantsberger was asked to return to what plaintiffs' counsel described as "the Pavlov's dog analogy." (Tr. at 3218.) Although Lantsberger had appeared to distance herself from that comparison at the close of cross-examination, she now reiterated the theory. (Tr. at 3219, 3221.)

3. Craig Thompson

Dr. Lantsberger described a variety of symptoms while testifying on Mr. Thompson's behalf. Only a limited

effort was made to link any of them to the cleanup project on a more probable than not basis.

(a) Deposition Testimony

Dr. Lantsberger first saw Mr. Thompson in October, 1989. He complained of memory loss, among other things. (Tr. at 2655.) With respect to memory loss, Dr. Lantsberger was asked the following questions during a deposition which took place in November, 1993. "[I]s it your testimony that his complaints of memory loss in 1989 may possibly have been due to his industrial exposure, but you can't say with probability that they were?" (Tr. at 2660.) "Correct," she replied. *Id.*

(b) Direct Examination

At one point, Dr. Lantsberger said that Thompson complained to her of feeling "very sleepy" and "high" while working at Kaiser. (Tr. at 1789-90). At another, she said she had treated him for memory loss. (Tr. at 1800). However, Lantsberger did not testify that Thompson's mental sensations reflected neurologic injury; nor did she say that his memory loss could be attributed (on a more probable than not basis) to work at Kaiser.

With respect to respiratory impairment, Lantsberger testified that Thompson "had indicated to me that he had had an increase in the symptoms that he's had since his exposure while he was at work." (Tr. at 1821.) The increase in symptoms was apparently enough to persuade Lantsberger "that the exposure on the work site aggravated his lung conditions." (Tr. at 1822.)

(c) Cross-examination

Dr. Lantsberger saw Mr. Thompson during October, 1989. The physical examination was normal, with the exception of "crackles in the bases of his lungs." (Tr. at 2676.) Besides doing a physical exam, Dr. Lantsberger ordered a number of tests. While a chest x-ray and pulmonary function tests were normal, (Tr. at 2679, 2685), a methacholine challenge test was positive. (Tr. at 2680.)

Mr. Thompson went to Dr. Lantsberger during June, 1990, complaining of a sore throat and cough. (Tr. at 2694.) She diagnosed an upper respiratory infection. (Tr. at 2695.) When asked whether the infection was "probably related or caused by his industrial exposure," (Tr. at 2696), she replied, "As a direct, single affect [sic], causal relationship, no." *Id.*

During December, 1990, Thompson was seen by one of Dr. Lantsberger's colleagues. (Tr. at 2703.) He had an upper respiratory infection. *Id.* According to Lantsberger, Thompson "may have had more sensitive respiratory mucosa, resulting in him having an increased susceptibility to infection." (Tr. at 2704.) However, when questioned by defense counsel, she conceded that it was a possible cause not a probable cause. *Id.*

Thompson went to Lantsberger during January, 1991, for another respiratory infection. (Tr. at 2706.) Lantsberger was asked whether it was true that the infection had a possible – but not a probable – relationship to his work at Kaiser. *Id.* She said, "As a specific single etiology causal factor, correct." *Id.*

Thompson went from February, 1991, until September, 1992, without further respiratory problems. (Tr. at 2720.) During an examination in September, 1992, Lantsberger detected crackles in his lungs. (Tr. at 2721.) However, she conceded that the crackles were consistent with his "significant" smoking. *Id.*

(d) Redirect Examination

Dr. Lantsberger explained her "aggravation" theory during redirect. She said, "[T]he fact that he is having problems that exist now that didn't exist before he had his work at Kaiser leads me to think that there was some aggravation of these preexisting conditions as a result of his workplace." (Tr. at 3083.)

As she had with respect to Dan Glass and David Schudel, Dr. Lantsberger testified that Thompson had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3098.) However, she made no effort to link Thompson's alteration of consciousness with her prior diagnosis.

(e) First Recross

During recross, Dr. Lantsberger repeatedly asserted that Thompson's condition had been "aggravated" by work at Kaiser. In each instance, she was confronted with strikingly inconsistent deposition testimony. *See, e.g.*, Tr. at 3164 ("headaches he complained of in 1989 were different in frequency and severity and were most likely not related to the headaches that he was experiencing while

he was on the job site"); Tr. at 3165 (possible that memory loss was due to industrial exposure, but not probable).

4. Tim Schudel

Dr. Lantsberger was the only expert to testify on Tim Schudel's behalf. While on the stand, she listed the various symptoms he had reported to her. However, when it came to the question of causation, her testimony was quite tentative.

(a) Direct Examination

Dr. Lantsberger was asked whether she had "an opinion based upon reasonable medical probability as to whether there's any relationship between Tim Schudel's lung problems and memory problems and his exposure to the chemicals in 1988?" (Tr. at 1885.) She responded in the following manner, "He indicated to me that he hadn't had any problems with memory or concentration or breathing problems prior to his employment on the job site." *Id.*

Shortly thereafter, Dr. Lantsberger was again asked whether she had "an opinion as to whether there's any relationship between Mr. Tim Schudel's long problems and his memory problems and the exposure to the chemicals in 1988?" (Tr. at 1888.)

She said, "Mr. Schudel had indicated to me in his history and through the testing process that he had not had any problems with his lungs nor any problems with his memory prior to being exposed in 1988." *Id.*

Plaintiffs' counsel followed up by asking, "So is there a relationship there?" *Id.* To which Lantsberger replied, "I believe so." *Id.*

(b) Cross-examination

Dr. Lantsberger acknowledged that although Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," Tr. at 2841, "[w]e never did get him in to see one." *Id.*

Mr. Tim Schudel was examined by psychologist Lloyd Cripe. Dr. Cripe asked that Mr. Schudel be informed "that there is no clear indication that his brain has been damaged as a result of his exposure." (Tr. at 2847.) Cripe went on to say, "While it is possible that his previous learning disabilities have been exacerbated or strained in some manner, it is not possible in a medical/legal manner to be reasonably certain that he has suffered any kind of appreciable brain dysfunction related to the industrial toxic exposure." *Id.*

After being counseled regarding Dr. Cripe's report, Schudel made no further complaints regarding memory loss. (Tr. at 2850.)

(c) Redirect

Dr. Lantsberger testified that Tim Schudel experienced an "alteration of consciousness" while exposed to chemicals at Kaiser. (Tr. at 3097.) As with the other workers, no effort was made to link that opinion to a specific diagnosis.

With respect to her "aggravation" opinion, Dr. Lantsberger said, "In relationship to him as a whole person in the totality of the information that was supplied to me, as a whole, I think that his condition was, on a more probable than not basis, an aggravation of his preexisting conditions." (Tr. at 3140.)

5. Kathrene Froese

Two experts testified regarding Ms. Froese's specific complaints. One was Dr. Jonathan Ostrow. The defendants concede that he "opined with reasonable medical probability that Ms. Froese [has] irritant-induced Reactive Airways Dysfunction Syndrome." (Defendants' Memorandum in Support of Renewed Motion at 76.)

The other expert to testify regarding Ms. Froese's complaints was Dr. Lantsberger. She mentioned a number of non-respiratory problems, including rash (Tr. at 1846-48), memory loss (Tr. at 1851, 1862-64), headaches (Tr. at 2772-73), and "whole person" aggravation (Tr. at 3144.)

(a) Direct examination of Dr. Lantsberger

Ms. Froese told Dr. Lantsberger that she had developed a rash while working at Kaiser. (Tr. at 1846.) According to Ms. Froese, the rash appeared on those portions of her body that were most exposed to the cleaning agents she was using. (Tr. at 1846-47). Although Dr. Lantsberger implied that the cleaning agents caused the rash, she was never asked whether she had an opinion on that matter.

Dr. Lantsberger testified that Ms. Froese complained of memory "difficulties." (Tr. at 1862.) She acknowledged, however, that "we never were able to do full neuropsychological testing on her." *Id.*

Plaintiffs' counsel did not ask Lantsberger whether Froese's reported memory difficulties were related to her work at Kaiser. Plaintiffs' counsel did ask, however, whether it is "harder to show by objective test" that a person who is not very bright has "been injured by exposure to chemicals." *Id.* Lantsberger said that it was, clearly implying that the jury could find organic brain damage notwithstanding the absence of neuropsychological testing. (Tr. at 1862-64.)

(b) Cross-examination of Dr. Lantsberger

On cross, Dr. Lantsberger was asked whether she would agree that the headaches which Ms. Froese complained of in 1989 were unrelated to work at Kaiser. Lantsberger equivocated, saying, "Other than the fact that Ms. Howell indicated that since the time that she worked there she's had persistent headaches. In relationship to the fact that a significant number of the coworkers complained of this, which means specific etiology causing an infectious relationship, no, I can't do that." (Tr. at 2772-73.)

When defense counsel pressed for a more concise answer, Lantsberger replied, "As a specific sole cause, no." (Tr. at 2773.)

Later, Dr. Lantsberger was asked by defense counsel whether Ms. Froese had experienced an alteration of consciousness during the cleanup. (Tr. at 2828.) In response, Lantsberger testified that Froese "had commented that she had problems with headaches." (Tr. at 2829.) That led to the following exchange:

"Was a headache an alteration of consciousness," defense counsel wanted to know?

"It's a neurologic symptom," Lantsberger replied.

But "[I]s it an alteration of consciousness," defense counsel asked?

"Technically of consciousness, no," Lantsberger said. *Id.*

(c) Redirect examination of Dr. Lantsberger

On redirect, Lantsberger reversed her position on alteration of consciousness. With respect to that phenomenon, she now said, "That's often one of the symptoms of the chemical that is affecting the brain is by giving headaches." (Tr. at 3092.)

After soliciting that statement, counsel for the plaintiffs asked, "Did you take into account her alteration in level of consciousness and her low intellect in forming your opinions as to Kathrene Froese?" *Id.*

"Yes," Lantsberger replied, "I did." *Id.*

At that point, plaintiffs' counsel broke off her line of questioning. Although she suggested that she would

"come back to that," she never asked Lantsberger whether Froese's alteration of consciousness caused a specific injury.

The final issue addressed on redirect was that of "aggravation." Counsel for the plaintiffs asked, "Would you please tell the jury if you have an opinion, based upon reasonable medical probability, as to Kathrene Howell Froese as a whole person in relationship to her condition and her exposure to the chemicals at the 1988 clean-up at the Kaiser Trentwood plant?" (Tr. at 3144.)

After an objection, Lantsberger responded by saying, "As I had indicated, I have to look at these people as a total. And I have to look at all of the information as an aggregate. And as a result of putting all of the information together, I believe that the problems that she is experiencing are an aggravation of her preexisting condition. Aggravated as a more probable than not cause from her exposure." *Id.*

6. Merlin Carlson

Two experts analyzed the symptoms that Merlin Carlson reported. One was Dr. Daniel Goldstein. Although the defendants challenge the admissibility of his testimony on a number of other grounds, they concede that he testified – on a more probable than not basis – that Mr. Carlson sustained brain damage due to solvent exposure. (Defendants' Memorandum in Support of Renewed Motion at 82.)

The other expert who analyzed Mr. Carlson's symptoms was Dr. Lantsberger. Not only did she testify about

respiratory problems (Tr. at 1922-23, 1925-26), but she also testified about fatigue, headaches, "overall body pain," and "whole person" aggravation. (Tr. at 1926, 3143.)

(a) Direct examination of Dr. Lantsberger

On direct, Dr. Lantsberger was asked whether she had an opinion regarding the cause of Mr. Carlson's "problems with breathing." (Tr. at 1925.) She said that she had reached the "same conclusion" with respect to his "breathing problems" that she had reached with respect to his "brain injuries," namely, "[t]hat he has a similar pattern as the other coworkers, and that the overall epidemilogical data leads me to believe that his exposure in the work site is the joining factor of all of the physical problems." (Tr. at 1926.)

Next, Dr. Lantsberger was asked whether there was a relationship between Carlson's complaints of "fatigue, headache, [and] overall body pain" and "exposure to chemicals in 1988." *Id.* She replied, in part, "The other coworkers complaining of the same, similar respiratory, cognitive, joint and body aches, leads me to assume based on epidemiological look at the exposure, the symptoms beginning about the same time frame and continuing subsequently leads me to believe that they are associated with the exposure." (Tr. at 1926-27.)

(b) Cross-examination of Dr. Lantsberger

Dr. Lantsberger acknowledged that it was during August, 1991, that she last made a note regarding Carlson's complaints of breathing problems. (Tr. at 2935.) She

further acknowledge that Carlson does not have Reactive Airways Dysfunction Syndrome, (Tr. at 2935), and that she has never diagnosed asthma. *Id.*

With respect to "bone pain and joint aches," she said, "I don't know what caused these guys to have the aches and pains, but I do now that a significant number of the workers did have them." (Tr. at 2936.)

(c) Re-direct examination of Dr. Lantsberger

Dr. Lantsberger denied that it made sense to look at Merlin Carlson in terms of "isolated incidences [sic]." (Tr. at 3142-43.) Over objection, she testified, "In terms of his entire exposure, his preexisting as, as a consequence of his exposure, I think that his preexisting problems were aggravated by his exposure at Kaiser on a more probable that not basis." (Tr. at 3143.)

7. Deborah Williams

A number of experts testified for Ms. Williams, including Drs. Lantsberger, Morton and Keppel. Although much of Dr. Lantsberger's testimony may be construed as foundation for opinions given by other experts, she was asked to render opinions of her own. For example, during redirect, she reiterated her theory of aggravation, saying, "I think in terms of Debbie, again, . . . taking it in totality, that on a more probable than not basis, I think that her conditions as we have outlined them have been aggravated by her exposure at, by her work at the Kaiser plant." (Tr. at 3145.)

8. Ruth Hopkins/John Hopkins

The defendants concede that the Hopkins' principal claims involved respiratory injuries. The defendants argue, however, that the Hopkins also maintained a claim for brain damage. The record reflects the following concerning the defendants' contention:

During direct examination, Dr. Samuel Milham was asked by counsel for the Hopkins to read the conclusion of a study to the jury. Milham relied, in part, "[T]he *severe neurologic injuries suffered by the workers in the incident* are sobering reminders that easily preventable organic solvent related occupational illness continues to occur in a highly developed country in the late 20th century." (Tr. at 1436.) (Emphasis added.)

In addition, the Hopkins' attorney participated actively in the cross-examination of Dr. Neil Rosenberg, the defendant's expert on the subject of solvent-induced organic brain damage. (Tr. at 9473-89, 9529-40.) He questioned Rosenberg about neurologic injury in general, (*see, e.g.*, Tr. at 9481-82), and Mrs. Hopkins' case in particular – including magnetic resonance imaging ("MRI".) (Tr. at 9538-39.) He also had Rosenberg confirm that his testimony had nothing to do with the "pulmonary aspect of this case." (Tr. at 9540.)

During closing, the Hopkins' attorney devoted most of his time to pulmonary complaints. He did not restrict himself to that subject, however. For example, he asked the jury to think about Ruth Hopkins' "memory problems." (Tr. at 12022.) Later, he said, "These chemicals can hurt you. They can hurt your organs. They can hurt your brains." (Tr. at 12028.)

It was at this point that he asked the jury to discount Dr. Rosenberg's testimony about magnetic resonance imaging and Toluene abusers. In essence, he argued that his clients' exposure to organic solvents was distinguishable from that of the Toluene abusers Dr. Rosenberg had described, thereby implying that it was of no significance that Mrs. Hopkins's MRI was normal. (Tr. at 12028-29.)

D. Sufficiency of Certain Expert Opinions (Analysis)

A motion for judgment as a matter of law may be granted when "a party has been fully heard with respect to an issue and there is no *legally sufficient evidentiary basis for a reasonable jury to have found for that party* with respect to that issue. . . . " Fed.R.Civ.P. 50(a)(1). *See Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir.1993). The moving party must demonstrate that insofar as the verdict is concerned, the evidence permits but one reasonable conclusion. *Conner v. Sakai*, 15 F.3d 1463, 1467 (9th Cir.1993).

1. Dan Glass

Dr. Lantsberger examined Mr. Glass on three occasions. The first examination occurred during October, 1989; the second during May, 1990; and the third during September, 1991. Mr. Glass did not report respiratory problems on those occasions, nor did Dr. Lantsberger diagnose pulmonary injury or disability. Given the record as it now exists, a reasonable jury could not have found for Mr. Glass on that issue.

With respect to Mr. Glass' heart palpitations, Dr. Lantsberger could only say that they may have been related to his industrial exposure. Testimony of that sort is legally insufficient. Under Washington law, an opinion that a "physical disability 'might have' or 'possibly did' result from the hypothesized cause" is nothing more than conjecture. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). "To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *Id.*

Regarding headaches and memory loss, Dr. Lantsberger was forced to concede that she had been unable to find a cause-and-effect relationship between Glass' participation in the Kaiser cleanup and his subsequent complaints. Thus, her testimony concerning those conditions falls short of the *O'Donoghue* standard.

Dr. Lantsberger attempted to bridge that causal gap by suggesting that Glass' "whole person" had been "aggravated." However, after *Daubert* and *Claar*, it is difficult to see how Lantsberger's fall-back theory can be considered "scientific knowledge." If none of Glass's specific symptoms can be linked to the cleanup on a more-probable-than-not basis, how is it possible that his whole person was aggravated?

It is the plaintiffs' burden to demonstrate that Dr. Lantsberger arrived at her conclusions "using scientific methods and procedures," and that her "conclusion [are] not mere subjective beliefs or unsupported speculation." *Claar*, 29 F.3d at 502. Insofar as Lantsberger's aggravation

theory is concerned, the plaintiffs have failed to satisfy that requirement.

In conclusion, a reasonable jury could not have found for Glass on any of his claims. Dr. Lantsberger's causation testimony was legally insufficient, and her aggravation theory is not scientific knowledge.

2. David Schudel

It is undisputed that Mr. Schudel did not sustain neurologic injury as a result of his participation in the Kaiser cleanup. A reasonable jury could not have found for him on that issue. Similarly, although Dr. Lantsberger suggested that Schudel's exposure to chemicals caused actual pulmonary injury, she could say only that his "lung condition" was "related to his exposures." Given Lantsberger's uncertainty, a finding for Schudel on a claim of actual pulmonary injury would have been nothing more than speculation. *O'Donoghue*, 73 Wn.2d at 824.

Two possibilities remain. One is that Mr. Schudel has developed a conditioned response to chemicals as a result of working at Kaiser. The other is that his whole person was aggravated. The latter has already been discussed. It is not sound science. With respect to the former (*i.e.*, conditioned response), there are two serious questions. First, is Dr. Lantsberger qualified to render an essentially psychiatric opinion? Second, is there anything in the record to indicate that her opinion reflects scientific knowledge?

It is clear from Dr. Lantsberger's testimony that David Schudel's response to odors is psychological in

nature. Notwithstanding its psychological nature, plaintiffs' counsel made no effort to show that Dr. Lantsberger is qualified to diagnose or treat psychological disorders. Indeed, she freely admitted that she is not an expert in psychiatry. (Tr. at 2337.)

Even if Dr. Lantsberger was qualified to render a psychiatric opinion of the sort she gave here, plaintiffs' counsel failed to establish that Lantsberger's conclusion reflects sound science. Not one journal article was offered in support of Dr. Lantsberger's opinion, nor was an effort made to satisfy any of the other *Daubert* criteria. As a result, Dr. Lantsberger's opinion fails to pass Rule 702 muster.

3. Craig Thompson

Dr. Lantsberger failed to link any of Mr. Thompson's specific complaints to the Kaiser project on a more-probable-than-not basis. Her fall-back was "aggravation," a theory which does not meet the standards for admissibility established by Rule 702. It follows that the jury's verdict in Mr. Thompson's favor was based upon speculation, nothing more.

4. Tim Schudel

Dr. Lantsberger acknowledge that Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," but that she "never did get him in to see one." Notwithstanding the absence of expert pulmonological evidence, Lantsberger suggested that Schudel developed

respiratory problems as a result of his exposure to "chemicals." In that regard, however, she could say only that he told her that he had not had problems before Kaiser and that he did have problems after Kaiser.

That Mr. Schudel's symptoms appeared after he worked at Kaiser may establish a temporal link between work and symptoms, but it does not establish a causal link. *See Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 974 (4th Cir.1990) (mere fact that a child suffered seizures after receiving a vaccination insufficient to establish causation). Dr. Lantsberger's testimony on that point is therefore insufficient.

Tim Schudel obtained neuropsychological testing. While the psychologist report that it was possible that Schudel's previous learning disabilities had been aggravated, he could not say that aggravation was reasonably certain. Indeed, as soon as Schudel was counseled regarding the report's findings, he quit complaining of memory loss. Given those undisputed facts, a reasonable jury could not have found for Mr. Schudel on the question of neurological injury.

That leaves Dr. Lantsberger's aggravation theory. It is neither scientifically nor causally sufficient to support the jury's verdict.

5. Kathrene Froese

A reasonable jury could have found for Ms. Froese on her respiratory claim. Were that her only claim, no further discussion would be necessary. However, it was not. Dr. Lantsberger was asked to testify regarding Ms.

Froese's complaints of rash, memory loss, and headaches. With respect to these symptoms, Dr. Lantsberger was either never asked about a causal relationship, or if she was, her testimony fell short of the *O'Donoghue* standard.

6. Merlin Carlson

Mr. Carlson's principal claim was for toxic encephalopathy. He did not stop there, however. Dr. Lantsberger reported breathing problems, fatigue, headaches, and "overall body pain."

With respect to respiratory complaints, Dr. Lantsberger was forced to concede that Mr. Carlson does not have Reactive Airways Dysfunction Syndrome or industrially induced asthma. Similarly, with respect to "bone pain and joint aches," she could only say, "I don't know what caused these guys to have the aches and pains, but I do know that a significant number of the workers did have them." Given the record, a reasonable jury could not have found for Mr. Carlson on his non-neurological claims.

7. Deborah Williams

Ms. Williams presented claims for organic brain damage and respiratory injury. A number of experts testified on her behalf. Although Dr. Lantsberger opined that Ms. Williams' "conditions" were aggravated by work at Kaiser, it is questionable whether her testimony would have had appreciable impact on the jury's verdict.

8. Ruth Hopkins/John Hopkins

Based upon the evidence presented by the Hopkins, their cross-examination of Dr. Rosenberg, and the manner in which they argued their case, a reasonable jury would have assumed the Hopkins were making a claim for brain damage. Granted, the jury may not have viewed it as the Hopkins' principal claim, but the jury would have understood that it was a very real part of the Hopkins' case. Therein lies the problem. Having chosen to make a claim for solvent-induced brain damage, the Hopkins were obligated to prove it. They failed to do so. A reasonable jury could not have found that the Hopkins suffered neurologic injuries as a proximate cause of the defendants' negligence. The defendants are therefore entitled to judgment as a matter of law on that particular claim.

E. Sufficiency of Certain Expert Opinions (Conclusion)

In view of the foregoing, the defendants are entitled to judgment as a matter of law on a number of claims. They include the following: all claims asserted by Dan Glass, David Schduel, Craig Thompson and Tim Schudel; all non-respiratory claims asserted by Kathrene Froese; all non-neurological claims asserted by Merlin Carlson; and all non-respiratory claims asserted by the Hopkins.

Although several claims must be dismissed, several remain. The next question is whether a new trial is necessary.

Approximately six weeks prior to trial, the Court asked the plaintiffs to list their claims against the defendants. (Order Re *Daubert* Procedure (Ct. Rec. 326) at 7.) The plaintiffs declined to do so. (Plaintiffs' Lists of Claims (Ct. Rec. 334).) Instead, they presented the jury with a long list of symptoms, only some of which could be connected to the plaintiffs' work at Kaiser on a more probable than not basis. Furthermore, when it came time to instruct the jury, the plaintiffs rejected a suggestion that the jurors be asked to decide specific claims.

The plaintiffs' choice of tactics has placed the Court in an awkward position. Because the jurors were not asked to return verdicts with respect to each plaintiff's individual claims, it is now impossible to separate the wheat from the chaff. Thus, the Court is forced to conclude that the verdicts in favor of Kathrene Froese, Merlin Carlson, Ruth Hopkins and John Hopkins are too tainted to stand. For that reason, the plaintiffs' remaining claims must be re-tried.

III. DEFENDANTS' MOTION FOR NEW TRIAL

The defendants give twelve reasons why the Court should order a new trial. Fed.R.Civ.P. 59. They include the following: First, by urging the jury to "send a message" to the defendants, the plaintiffs injected irrelevant, arbitrary, and punitive considerations into the jury's deliberations. Second, the Court failed to instruct the jury on Washington's medical causation standard. Third, the Court's instructions with respect to state and federal safety regulations were in error. Fourth, the Court failed to instruct the jury on the limited duties of the employer

of an independent contractor. Fifth, the plaintiffs violated a pretrial order by introducing evidence regarding Daniel Skeman. Sixth, the Court applied *Bryan v. John Bean*, 566 F.2d 541 (5th Cir.1978), in an improper manner. Seventh, the defendants should have been allowed to cross-examine the plaintiffs regarding inconsistent statements made to Diane Nebel. Eight, the plaintiffs should not have been allowed to offer evidence regarding symptoms experienced by non-plaintiff workers. Ninth, the plaintiffs were permitted to suggest that a defense expert had no basis for opining that Mrs. Hopkins's depression had a cause other than that suggested by her experts. Tenth, the jury's verdict was against the weight of the evidence. Eleventh, the damages awarded were excessive both as a matter of fact and a matter of law. Twelfth, the defendants' right to cross-examination was violated.

Given the Court's various rulings with respect to the defendants' motion for judgment as a matter of law, the defendants' alternative request for a new trial is moot with respect to all but Deborah Williams. Insofar as she is concerned, the defendants' motion is denied.

IV. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

On July 22, 1994, the plaintiffs filed a timely request for attorneys' fees, together with a request for costs beyond those normally awarded to prevailing parties. Fed.R.Civ.P. 54(d). The defendants have objected to both.

Since then, the Court has granted the defendants' Rule 50(b) motion in substantial part, dismissing a number of the plaintiffs' claims. Only the verdict in favor

of Ms. Williams remains intact. However, because it does, she may be entitled to fees and costs.

The Court has two options concerning Ms. Williams's request. It can defer ruling until after the appellate process has run its course, or it can decide the matter of fees and costs at this juncture. Fed.R.Civ.P. 58 advisory committee's note (1993 amendment).

The latter is the best course. This lawsuit has generated a number of complex legal questions, among them whether Ms. Williams is entitled to fees and costs. Instead of presenting them to the Court of Appeals piecemeal, it is best to resolve as many as possible now so that they may be reviewed together. *Id.* ("in many cases it may be more efficient to decide fee questions before an appeal is taken").

One final issue must be addressed before turning to the merits of Ms. Williams's request – the matter of the Court's jurisdiction. As the advisory committee noted, post-trial fee requests can create complicated jurisdictional questions. To avoid them, Rule 58 permits a district court to treat a request for fees as a Rule 59 motion and extend the time for appeal from the underlying judgment. Fed.R.Civ.P. 58. It is appropriate to do so here, and the Court so orders.

A. Attorneys' Fees

Ms. Williams submits that her request for fees may be granted under either of two theories. One is based upon state law, the other upon federal law. The two theories will be examined separately.

(a) State Law

When a request for attorneys' fees is made in a diversity action, and the request arises from the substance of a state-law claim, the request is governed by the law of the forum state. *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir.1992). Washington follows the "American Rule." *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). According to that rule, a court has no power to award attorney fees as a cost of litigation absent a contract, a statute, or some recognized principle in equity. *Id.* Here, there is neither a contractual nor an equitable basis for awarding fees. If Ms. Williams is to recover attorneys' fees, she must cite a statute which authorizes them. She attempts to do just that.

According to Ms. Williams, the defendants violated the Washington Industrial Safety and Health Act ("WISHA")[2] by failing to provide adequate warnings regarding the solvents used in the cleanup. She does not assert that the defendants are liable for fees under WISHA, however. Instead, she argues that the defendants are liable for attorneys' fees under one of three entirely separate statutes – the Worker and Community Right to Know Act.,[3] the Hazardous Waste Management Act,[4] or the Model Toxics Control Act.[5]

Although ingenious, Ms. Williams's state-law theory is without merit. First, the jury did not find that the

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[2] RCW Chapt. 49.17.

[3] RCW Chapt. 49.70

[4] RCW Chapt. 70.105.

[5] RCW Chapt. 70.105D.

defendants violated either WISHA or any regulation promulgated thereunder. Thus, there would appear to be no basis for Ms. Williams's assertion that the defendants violated that statute. Second, while it is true that the Worker and Community Right to Know Act, the Hazardous Waste Management Act, and the Model Toxics Control Act authorize fees in certain limited situations, there is nothing in them to suggest that their (respective) fee provisions can be invoked based upon a violation of an entirely separate statute. *See, e.g.*, RCW 49.70.150 (a civil action may be brought to "compel compliance with the provisions of this chapter or any rule promulgated under this chapter"); RCW 70.105.097 (a "person injured as a result of a violation of this chapter or the rules adopted thereunder may bring an action . . . "); RCW 70.105D.080 ("a person may bring a private right of action . . . for the recovery of remedial action costs"). Finally, neither Ms. Williams nor any of the other plaintiffs included the matter of attorneys' fees in the pretrial order. *See Price Dev. Co. v. Redevelopment Agency*, 852 F.2d 1123, 1128 (9th Cir.1988) (denying request for fees where pretrial order contained no indication that parties would be seeking fees).

(b) Federal law

Ms. Williams also seeks fees under 28 U.S.C. § 1927. That statute provides that an "attorney . . . who so multiplies the proceedings . . . unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Without question, the attorneys for the defendants mounted a very aggressive defense on behalf of their clients. There is no evidence, however, that they acted in bad faith. For that reason, § 1927 is inapplicable here. *See MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Ciri.1991) (§ 1927 requires a finding of bad faith).

B. Costs

In light of the Court's prior rulings, it is clear that Ms. Williams will need to revise her request for costs. She should consider the following in doing so:

Ms. Williams asked for expert witness fees. Since none of her witnesses were court-appointed, she is limited to the sums authorized by 28 U.S.C. § 1821. *See Association of Flight Attendants v. Horizon Air*, 976 F.2d 541, 551-52 (9th Cir.1992).

Ms. Williams seeks reimbursement for obtaining copies of depositions. Although district courts have the authority to tax such costs, *Alflex Corporation v. Underwriters Laboratories*, 914 F.2d 175, 177 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 61, 116 L.Ed.2d 36 (1991), the exercise of that discretion is often guided by local rule. In this district, "[s]tenographic fees for depositions may be allowed only when the deposition is used at trial or hearing for substantive, as opposed to impeachment purposes. Only the original deposition shall be taxed." Local Rule ("LR") 54(f)(2).

In addition, Ms. Williams may be asking for other costs associated with the taking of depositions. If so, she must demonstrate that the costs were necessarily

incurred. *See Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1438-39 (9th Cir.1993).

Finally, Ms. Williams seeks compensation for expenses assumed in obtaining daily transcripts of court proceedings. Because of the length and complexity of the case, Ms. Williams is entitled to an award of costs for those portions of the daily transcript necessary for presentation of her claims. *See Independent Iron Works, Inc. v. United States Steel Corporation*, 322 F.2d 656, 678 (9th Cir.) (trial transcripts were reasonably necessary given the complexity and length of proceedings), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963).

V. MOTION TO AMEND VERDICT

Kaiser Aluminum and Chemical Corporation is one legal entity; Kaiser Aluminum Corporation is another. Since at least October, 1991, it is Kaiser Aluminum and Chemical Corporation which has been one of the two named defendants in this action.

The jury returned its verdict on July 13, 1994. Judgment was entered that same day. The judgment refers to Kaiser Aluminum Corporation, not Kaiser Aluminum and Chemical Corporation.

Defendant Kaiser Aluminum and Chemical Corporation now moves the Court, pursuant to Rule 60, to amend the judgment to reflect its true name. The plaintiffs do not object.

Kaiser aluminum and Chemical Corporation is correct. The wrong corporate entity was listed in the judgment. As a result, its motion will be granted and the judgment modified accordingly.

VI. MOTION TO SET DISCOVERY HEARING

The Plaintiffs move the Court to set a hearing to investigate their allegations that the defendants abused the discovery process. No authorities have been cited in support of this request.

Given the Court's previous rulings, the plaintiffs' motion is (at best) premature. Consequently, their motion will be denied.

VII. MOTION TO STAY EXECUTION OF JUDGMENT

The defendants move the Court to stay any proceedings to enforcement the judgment pending resolution of their post-trial motions. Fed.R.Civ.P. 62(b). With entry of this order, the defendants' request becomes moot. It will therefore be denied.

IT IS HEREBY ORDERED:

1. The plaintiffs' motion to strike defense motions as untimely **(Ct. Rec. 536) is denied.**

2. The defendants'motion to strike plaintiffs' memorandum **(Ct. Rec. 565) is denied.**

3. The plaintiffs' motion to strike reply **(Ct. Rec. 552) is denied.**

4. The defendants' motion for judgement as a matter of law (**Ct. Rec. 488**) is **denied** in part and **granted** in part. The judgments entered herein are re-opened and modified as follows:

(a) The defendants are granted judgment as a matter of law on all claims asserted by Dan Glass, David Schudel, Craig Thompson and Tim Schudel. Those claims are dismissed with prejudice.

(b) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Kathrene Froese. Those claims are dismissed with prejudice.

(c) The defendants are granted judgment as a matter of law on all non-neurological claims asserted by Merlin Carlson. Those claims are dismissed with prejudice.

(d) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Ruth Hopkins and John Hopkins. Those claims are dismissed with prejudice.

5. The defendants are granted a new trial on all remaining claims.

6. The defendants' motion for new trial or alternative relief (**Ct. Rec. 486**) is **denied**.

7. The plaintiffs' timely request for attorneys' fees and costs shall have the same effect under Fed.R.App.P. 4(a)(4) as a Rule 59 motion, and the period for filing a notice of appeal shall be extended accordingly.

8. The plaintiffs' request for attorneys' fees and costs is **denied** in part and **granted** in part. Ms. Deborah Williams is directed to submit a revised cost bill.

9. Defendant Kaiser Aluminum and Chemical Corporation's motion to amend or correct judgments (**Ct. Rec. 513**) is granted. The judgments entered herein shall refer to "Kaiser Aluminum and Chemical Corporation," not "Kaiser Aluminum Corporation."

10. The plaintiffs' motion for order shortening time (**Ct. Rec. 555**) is **denied**.

11. The plaintiffs' motions for order setting hearing on discovery abuses (**Ct. Recs. 534 and 563**) are **denied**.

12. The defendants' motion for stay of proceedings to enforce judgments (**Ct. Rec. 490**) is **denied.**

IT IS SO ORDERED. The Clerk is hereby directed to file this order, enter judgment accordingly, and furnish copies to counsel.

DATED this 22 day of November 1994.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHRENE FROESE; CRAIG A. THOMPSON; DEBORAH GUARANGA WILLIAMS; and JOHN HOPKINS and RUTH HOPKINS, husband and wife and the marital community composed thereof, Plaintiff(s), vs. GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, Defendant(s).	JUDGMENT IN A CIVIL CASE CASE NUMBER: CS-92-0081-FVS (Filed Jul. 13, 1994)

This action came on for trial before the Court and a jury, honorable Fred Van Sickle, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Tim Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Fifty-One Thousand Two Hundred Seventy

Dollars ($1,051,270.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Sandra Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Fifty Thousand Dollars ($50,000.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Three Hundred Forty-Eight Thousand Twenty Dollars ($1,348,020.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Four Thousand Forty Dollars ($1,404,040.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric

Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on his claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Merlin Carlson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Two Million Seven Hundred Seventy-Five Thousand Seven Hundred Sixty-Eight Dollars ($2,775,768.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Daniel Glass, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Nine Hundred Fifty-Six Thousand One Hundred Forty-Six Dollars ($956,146.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Deborah Guarangna Williams, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Nine Hundred Seven Thousand Seven Hundred Eighty-Three Dollars ($1,907,783.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Kathrene Froese, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Fifty-Nine Thousand Three Hundred Thirty-Two Dollars ($1,459,332.00), with

interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, David Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million One Hundred Thirty Thousand Seven Hundred Eleven Dollars ($1,130,711.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Craig Thompson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Five Hundred Fifty-Six Thousand One Hundred Ninety-Nine Dollars ($556,199.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

Dated: July 13, 1994 JAMES R. LARSEN, Clerk

by: /s/ Charles L. Randazzo
Charles L. Randazzo
Deputy Clerk

FILED IN THE
U.S. DISTRICT
EASTERN DISTRICT OF WASHINGTON

Nov. 25, 1994

JAMES R. LARSEN, CLERK
___ DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al., Plaintiff, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendant.	AMENDED **JUDGMENT IN A CIVIL CASE** CS-92-081-FVS

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion to strike defense motions as untimely is **DENIED**. The defendants' motion to strike plaintiffs' memorandum is **DENIED**. The plaintiffs' motion to strike reply is **DENIED**. The defendants' motion for judgment as a matter of law is **DENIED IN PART and GRANTED IN PART.** The judgments entered herein are re-opened and modified as follows: a) The defendants are **GRANTED** judgment as a matter of law on all claims asserted by Dan Glass, David Schudel, Craig Thompson and Tim Schudel.

Those claims are **DISMISSED WITH PREJUDICE**. b) The defendants are **GRANTED** judgment as a matter of law on all non-respiratory claims asserted by Kathrene Froese. Those claims are **DISMISSED WITH PREJUDICE**. c) The defendants are **GRANTED** judgment as a matter of law on all non-neurological claims asserted by Merlin Carlson. Those claims are **DISMISSED WITH PREJUDICE**. d) The defendants are **GRANTED** judgment as a matter of law on all non-respiratory claims asserted by Ruth Hopkins and John Hopkins. Those claims are **DISMISSED WITH PREJUDICE**. The defendants are **GRANTED** a new trial on all remaining claims. The defendants' motion for new trial or alternative relief is **DENIED**. The plaintiffs' timely request for attorneys' fees and costs shall have the same effect under FRAP 4(a)(4) as a Rule 59 motion, and the period for filing a notice of appeal shall be extended accordingly. The plaintiffs' request for attorneys' fees and costs is **DENIED IN PART and GRANTED IN PART**. Ms. Deborah Williams is directed to submit a revised cost bill. Defendant Kaiser Aluminum and Chemical Corporation's motion to amend or correct judgments is **GRANTED**. The judgments entered herein shall refer to "Kaiser Aluminum and Chemical Corporation" **NOT** "Kaiser Aluminum Corporation." The plaintiffs' motion for order shortening time is **DENIED**. The plaintiffs' motions for order setting hearing on discovery abuses are **DENIED**. The defendants' motion for stay of proceedings to enforce judgments is **DENIED**.

Dated: November 25, 1994 JAMES R. LARSEN, Clerk

by: /s/ Annie Smith
Annie Smith,
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al., et ux., Plaintiffs, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendants.	No. CS-92-081-FVS ORDER RE MOTIONS TO AMEND AND CERTIFY (Filed Jan. 17, 1995)

BEFORE THE COURT are motions to amend Order Re Post-Trial Motions,[1] and to authorize appeals from it. All motions were heard without oral argument on January 13, 1995.

CLAIM OF SANDRA SCHUDEL

Relief Requested

Mr. Timothy Schudel alleged that he suffered various injuries while working on the Kaiser cleanup project. His wife, Sandra Schudel, brought separate claims for loss of consortium based upon the injuries her husband allegedly suffered. Mrs. Schudel's loss-of-consortium claims were not addressed in the Order Re Post-Trial Motions. Now that Timothy Schudel's claims have been

[1] The order was entered on November 25, 1994. It is docketed as pleading 571.

dismissed with prejudice, the defendants move the Court to dismiss Sandra Schudel's loss-of-consortium claims.

Ruling

The defendant's motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants will be dismissed with prejudice.

MOTION FOR NEW TRIAL

Relief Requested

After the jury returned its verdicts, the defendants moved for a new trial (Ct. Rec. 486). Except in the case of Deborah Williams, the Court did not address the merits of the defendants' motion. (In her case, the defendant's motion was denied.) The defendants now move the Court, pursuant to Fed.R.Civ.P. 50(c)(1), to issue a conditional ruling with respect to the other plaintiffs.

Ruling

The defendant's motion for new trial will be denied with respect to all plaintiffs.

HOPKINS' MOTION TO RECONSIDER

Relief Requested

Plaintiffs Ruth Hopkins and John Hopkins move the Court to reconsider its decision vacating the verdicts in their favor and ordering a new trial. If the Court declines to do so, Ruth Hopkins moves the Court to clarify its

order regarding her claims. She notes that the Order Re Post-Trial Motions dismisses all non-respiratory claims. She wants to know whether the Court intended to preclude her from recovering for depression (allegedly) spawned by her respiratory problems.

Ruling

The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except with respect to Ruth Hopkins's request for clarification of the Court's ruling regarding recovery of damages for depression. If, upon retrial, Ruth Hopkins proves that she suffered depression as a result of respiratory problems caused by the defendants, she may recover damages for her depression.

RULE 54(b)

Relief Requested

Both sides move the Court to authorize appeals of the judgments adjudicating the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel. Fed.R.Civ.P. 54(b) (1994).[2] In addition, plaintiffs Kathrene Froese, Merlin Carlson,

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[2] Rule 54(b) states, in pertinent part, "When more than one claim for relief is presented in an action, . . . , or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Ruth Hopkins, and John Hopkins move the Court to permit them to appeal the order granting a new trial.

Analysis

Under Rule 54(b), the Court must first determine whether a final judgment exists. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7, 100 S.Ct. 1460, 1464, 64 L.Ed.2d 1 (1980). Once that task has been completed, the Court must decide whether there is any just reason to delay the appellate process. *Id.* at 8, 100 S.Ct. at 1465. In doing so, the Court must consider both the administrative impact of releasing claims for appeal, and "the equities involved." *Id.* at 8, 100 S.Ct. at 1465.

1. Existence of final judgments

The claims of ten plaintiffs are at issue in this action. Now that the Court has entered its Order Re Post-Trial Motions, the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel have been fully adjudicated. What of the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins?

In its order, the Court ruled that these four plaintiffs (*i.e.*, Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins) could not recover damages for certain (alleged) injuries. The judgments which had been entered in their favor were vacated, and a new trial was ordered. In other words, the order limited damages, but left their negligence claims otherwise unresolved pending a new

trial. As a result, insofar as Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins are concerned, the order is not a final judgment. *See Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir.1991) (holding that an order dismissing a claim for punitive damages was not final).

2. No just reason for delay

(a) Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel

The record is now complete with respect to these five claims. Nothing that might occur in district court will affect appellate review of these dismissals. It is now up to the Court of Appeals to determine whether each dismissal was proper. In doing so, the Court of Appeals will have to review each claim separately. Consequently, authorizing these five plaintiffs to appeal will not result in unwarranted duplication of appellate effort.

(b) Deborah Williams

The verdict in favor of Ms. Williams was upheld. Appellate review of that verdict will facilitate adjudication of those claims which must be retried.

3. The four remaining claims

The Court ordered a new trial with respect to the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins. An order granting a new trial is interlocutory. As a general rule, it is not appealable under

28 U.S.C. § 1291. *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir.1985); *Eaton v. National Steel Products Company*, 624 F.2d 863, 864 (9th Cir.1980). There is an exception to that rule, however. An order granting a new trial may be appealed if the district court no longer had jurisdiction to do so. *See Eaton*, 624 F.2d at 864.

Here, the plaintiffs moved to strike the defendants' post-trial motions, arguing that they were untimely. The Court denied the plaintiffs' motion, and granted post-trial relief. Should the Court of Appeals disagree with this Court's assessment of the timeliness of the defendants' post-trial motions, the Court of Appeals will have to determine whether this Court had authority to enter its Order Re Post-Trial Motions. Thus, the *Eaton* exception applies.

Ruling

There is no just reason to delay appeal of the Order Re Post-Trial motions.

COST BILLS

Plaintiff Deborah Williams has submitted a revised cost bill. No objections have been filed. Ms. William's request will therefore be approved.

The defendants are now the prevailing parties with respect to the claims asserted by Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel. The defendants move the Court (Ct. Rec. 274) for an order indicating that they have ten days from Rule

54(b) certification to file cost bills. Their request will be granted.

IT IS HEREBY ORDERED:

1. The defendants' motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants are dismissed with prejudice.

2. The defendants' motion for a conditional ruling (Ct. Rec. 574) is granted in part. The defendants' prior motion for a new trial (Ct. Rec. 486) is denied with respect to all plaintiffs.

3. The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except as indicated above.

4. The parties respective motions for Rule 54(b) certification (Ct. Recs. 574, 577) are granted.

(a) There is no just reason to delay appellate review of the Court's Order Re Post-Trial Motions (Ct. Rec. 571); and

(b) Since the Clerk has already entered judgment as directed by the Order Re Post-Trial Motions, that judgment (Ct. Rec. 572) will become the final judgment for purposes of Rule 54(b) upon entry of this order.

5. Deborah Williams's cost bill is approved.

6. The defendants are to submit a cost bill with respect to the claims of Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel within ten days of entry of this order.

7. Any other pending motions are denied as moot.

IT IS ORDERED. The Clerk is hereby directed to file this order, furnish copies to counsel, and close the case.

DATED this 13 day of January 1995.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District Judge

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2072. **Rules of procedure and evidence; power to prescribe.**

* * *

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Fed.R.Civ.P. 50(b)

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59(b) may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(1994 version).

Fed.R.Civ.P. 50(b)

(b) Renewing Motion for Judgment After Trial: Alternative Motion for a New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

1. If a verdict was returned:

(A) Allow the judgments to stand,

(B) Order a new trial, or

(C) Direct entry of judgment as a matter of law; or

2. If no verdict was returned:

(A) Order a new trial, or

(B) Direct entry of judgment as a matter of law.

(Amended version created by order dated April 27, 1995 amending rule effective 12/1/95).

Fed.R.Civ.P. 59(b) and (d)

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(1994 version).

Fed.R.Civ.P. 59(b) and (d)

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

* * *

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(Amended version of rule effective December 1, 1995).

The Supreme Court order dated April 27, 1995, found at 131 L.Ed.2d xcii, provides as follows:

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 50, 52, 59, and 83.

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1995, and shall govern all proceedings in civil cases thereafter commenced, and, insofar as just and practicable, all proceedings and civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code [28 U.S.C.S. Section 2072].

Fed.R.Ev. 104. PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Fed.R.Ev. 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion otherwise.

Fed.R.Ev. 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

AMENDMENT VII OF UNITED STATES CONSTITUTION

CIVIL TRIALS

In Suits of common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Supreme Court, U.S.
F I L E D
MAR 23 1998
CLERK

Nos. 97-1382, 97-1386 and 97-1410

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,
Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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37 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governed the admissibility of the scientific evidence in this diversity case and properly applied those standards?

2. Whether the court of appeals could and properly did apply amendments to the Federal Rules of Civil Procedure to a then-pending case as expressly authorized by the Rules and the enacting Order of this Court?

LIST OF PARTIES

Petitioners in No. 97-1382 are David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Kathrene Rae Howell Thompson Froese, and Craig Thompson [hereinafter, collectively, "Schudel"] and Deborah Guaranga Williams [hereinafter, "Williams"]. Schudel was plaintiff in the district court and appellant in the court of appeals. Williams was plaintiff in the district court and appellee in the court of appeals.

Petitioners in No. 97-1386 are Ruth Hopkins and John Hopkins [hereinafter, jointly, "Hopkins"]. Hopkins incorrectly identifies himself as having been appellee in the court of appeals. (Hopkins Pet. at iii.) Hopkins, plaintiff in the district court, was appellant in the court of appeals.

Petitioner in No. 97-1410 is Merlin E. Carlson, Jr. [hereinafter, "Carlson"]. Carlson was plaintiff in the district court and appellant in the court of appeals.

Respondents are the General Electric Company and Kaiser Aluminum and Chemical Corporation [hereinafter, jointly, "General Electric"]. Petitioners incorrectly identified one of the Respondents as Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation (Hopkins Pet. at iii; Schudel/Williams Pet. at ii.) Kaiser Aluminum Corporation is not and has not been a party to the proceeding.

RULE 29.6 LIST

The General Electric Company is a publicly held corporation with no parent companies. Its nonwholly owned subsidiaries are CAMCO, Inc. (Canada); Credit Del'Est; Finax FS AB; Finax KK AB; Gate Finance Corporation; GE Capital Aviation Services, Ltd; GE Capital Mortgage Services, Inc.; GE Capital (NZ) Ltd. (New Zealand); GE Capital PTY LTD. (Australia); GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; General Electric Capital Corporation; General Electric Capital Services, Inc.; General Electric Credit International, N.V.; GNA Corporation; Imaging Financial Services, Inc.; International GE Capital Corporation; Mercur Bank (Austria); Montgomery Ward & Company, Inc.; Outlet Broadcasting, Inc.; and Service Bank GmbH.

Kaiser Aluminum and Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation. Maxxam, Inc. is, in turn, the parent of Kaiser Aluminum Corporation. Kaiser Aluminum and Chemical Corporation has no nonwholly owned subsidiaries.

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IN THE

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OCTOBER TERM, 1997

Nos. 97-1382, 97-1386 and 97-1410

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,

Petitioners,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the court of appeals is published at 120 F.3d 991 (CA9 1997) and is reproduced in its entirety in each of Petitioners' Appendices. (Schudel/Williams Pet. App. at 1-15; Hopkins Pet. App. at 1-15; Carlson Pet. App. at A-1-A-15.) The opinion of the district court is unpublished and is reproduced in its entirety in the Schudel/Williams Appendix and the Carlson Appendix, and approximately ten of its 43 pages are reproduced in the Hopkins Appendix. (Schudel/Williams Pet.

App. at 19-61; Carlson Pet. App. at A-16-A-44; Hopkins Pet. App. at 19-28.) [Hereinafter, for the Court's convenience, all Appendix citations ("Pet. App.") refer to the Schudel/Williams Appendix.]

JURISDICTION

The court of appeals held that it lacked jurisdiction to review the district court's post-trial rulings and subsequent grant of a new trial as to Carlson, Hopkins, and one of the Schudel plaintiffs (Froese). The court of appeals dismissed their appeals. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the district court's post-trial rulings and subsequent grant of judgment against the remaining Schudel plaintiffs. The court of appeals reversed those judgments, reversed the denial of General Electric's alternative motion for new trials, and remanded. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the judgment entered on the jury verdict in favor of Williams. The court of appeals found Williams' expert testimony on causation inadmissible, vacated her judgment, reversed the denial of General Electric's motion for new trial, and remanded. (Pet. App. at 15.)

No party has a judgment at this time. This Court may accept a writ of certiorari to review the various rulings of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1998).

STATEMENT OF THE CASE

In the fall of 1988, Kaiser Aluminum and Chemical Corporation contracted with the General Electric Company to strip polychlorinated biphenyls ("PCBs") from five utility rooms in Kaiser's Trentwood facility outside of Spokane, Washington. The bulk of the work was manual labor—scraping and scrubbing down walls and pipes with detergents and solvent degreasers which would adsorb the PCBs. The job lasted about eight weeks. In this diversity

case, nine plaintiffs (petitioners here) alleged they developed myriad neurological and respiratory problems from working with those detergents and solvents.[1]

A. District Court Proceedings

Several months before trial, General Electric filed extensive pre-trial motions, including challenges to the admissibility of certain scientific evidence in accordance with Federal Rules of Evidence 104(a) and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). General Electric challenged in particular the soundness and scientific reliability of, and the methodology employed by plaintiffs' experts in reaching, the unprecedented opinion that plaintiffs collectively suffered from disabling solvent-induced encephalopathy, *i.e.*, diffuse brain damage, secondary to brief occupational exposures to products containing the solvents trichloroethane ("TCA") and perchloroethylene ("Perc").

Although it never held the "*Daubert* hearing" requested by all parties, the district court eventually ruled that a "question of fact" existed as to whether, and how, plaintiffs had been neurologically injured by solvents. The court made no findings at any time as to whether, or how, the methodology underlying plaintiffs' experts' theories of causation rose to the level of "scientific knowledge" required by *Daubert* in the absence of any accepted methodology or supporting literature.

At trial, plaintiffs' expert witnesses testified over General Electric's objections that plaintiffs as a group had suffered "brain damage" and other neurological injuries ranging from "toxic encephalopathy" to "whole person

[1] The personal injury claims included headache, rash, bone pain, overall body pain, fatigue, Pavlovian responses to odors, memory loss, upper respiratory infections, Reactive Airways Dysfunction Syndrome, brain dysfunction, alterations in consciousness, and other ailments. (Pet. App. at 24-51.) The tenth plaintiff-petitioner asserted a loss consortium claim. (Pet. App. at 69-70.)

aggravation." [2] This testimony was allowed, and was considered by the jury, although as the court of appeals ultimately found, it had no scientific basis:

- Plaintiffs' experts "conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic." (Pet. App. at 13.) Plaintiffs' experts further "admitted that medical science has not determined the effects of short-term exposure to the solvents involved." (Pet. App. at 14.)

- Plaintiffs' experts admitted that "it would be improper to infer conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents." (Pet. App. at 13.) Certainly, these experts "did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed the testimony indicated small differences in molecular structure often have significant consequences." (Pet. App. at 12.)

- Plaintiffs' experts acknowledged—inapposite to the facts of the case—"that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship." (Pet. App. at 13.)

- Plaintiffs' experts found no relevant or reliable data on TCA or Perc on which to rely. (Pet. App. at 13-15.) To the extent the experts referred to any scientific data at all, "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable." (Pet. App. at 13.)

- One of the plaintiffs' experts testified only to "possibilities" rather than "probabilities." (Pet. App. at 14; *see also* Pet. App. at 24-51 (district court opin-

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[2] Hopkins suggests that he offered "[u]nchallenged trial testimony" with respect to his "severe" injuries. (Hopkins Pet. at 5.) The assertion is acutely wrong but is irrelevant to the writ.

ion).) In the alternative, after she "admitted she could not testify to a specific cause and effect relationship," she "relied instead on a 'whole person aggravation' theory without establishing that the theory had a scientific basis." (Pet. App. at 14.)

At the end of the trial, and largely because of what the district court described as "plaintiffs' choice of tactics" in unfairly and improperly presenting their causation case (Pet. App. at 52), verdicts were returned in favor of all plaintiffs. Thus, when General Electric timely filed post-trial motions, including a second renewed motion for judgment as a matter of law and a motion for a new trial, both supported with extensive memoranda, the district court granted General Electric substantial relief: the court concluded (1) that five plaintiffs had failed to present any expert evidence which was scientifically sound or causally sufficient and therefore entered judgment as a matter of law in favor of General Electric on those plaintiffs' claims; and (2) that four plaintiffs presented claims which were inexorably contaminated with unscientific and/or insupportable expert opinion and therefore granted General Electric a new trial on those plaintiffs' claims.[3] (Pet. App. at 24-52, 60.) Only Williams' verdict was not disturbed. (Pet. App. 43, 53, 60.) In its order, the district court also rejected the argument of Schudel and Hopkins that General Electric had improperly served its post-trial motions upon them because General Electric had mailed the motions by Federal Express rather than by postal delivery. (Pet. App. at 19-21.)

On cross-motions of the parties, the trial court certified as final the judgments entered on the claims of the six

[3] Carlson incorrectly asserts that the district court ruled pursuant to Federal Rule of Civil Procedure 59(d) (motion on court's initiative). (Carlson Pet. at 8, 22-24.) The record is to the contrary, as the court of appeals held: "The district court ordered a new trial under Rule 50(b)." (Pet. App. at 7 n.9.) *See also* Schudel Pet. at 4 ("trial court did not act under its Rule 59(d) authority").

plaintiffs whose cases were fully disposed of, *i.e.*, the five plaintiffs against whom judgment was entered and the one plaintiff in whose favor judgment was entered. (Pet. App. at 71-74.) The court declined to enter final judgment on any claim with respect to the four "new trial" plaintiffs. (Pet. App. at 73.)

B. Court of Appeals Proceedings

On January 24, 1995, General Electric timely noticed its appeal from the judgment entered in favor of Williams. All plaintiffs other than Williams cross-appealed by notice dated February 7, 1995.

In addressing General Electric's substantive appeal with respect to Williams, the court of appeals properly focused on *Daubert*: "Scientific knowledge is reliable if it is 'ground[ed] in the methods and procedures of science' and 'connotes more than subjective belief or unsupported speculation.' " (Pet. App. at 10-11 (quoting *Daubert*, 509 U.S. at 590).) "In determining reliability, '[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate.' " (Pet. App. at 11 (quoting *Daubert*, 509 U.S. at 595).)

The court of appeals then correctly determined that the district court had erred in allowing the testimony of Williams' experts, who had made "no showing" that their methods were scientifically sound. (Pet. App. at 13.) Thus, the principles and methodology underlying Williams' experts' opinions "did not meet *Daubert's* requirement of reliability." (Pet. App. at 12, 12-15.)[4] The court of appeals also properly concluded that "[a]dmission of the challenged evidence was prejudicial . . . because it was the sole causation evidence with respect to Williams' neurological symptoms." (Pet. App. at 14.) The court of appeals therefore vacated the judgment entered on the

[4] The court of appeals found that one of Williams' experts in fact failed to meet *both* the reliability *and* the relevance prongs of *Daubert*. (Pet. App. at 14.)

jury verdict in Williams' favor and remanded for a new trial which will address the other (non-neurological) injuries Williams claimed. (Pet. App. at 15.)

In addressing Schudel's substantive appeal (with respect to those plaintiffs against whom judgment had been entered on General Electric's post-trial motions), the court of appeals found that the district court "properly concluded that [Schudel's expert's] testimony based on the 'whole person aggravation' theory of causation did not meet the standard of *Daubert* . . . and should have been excluded." (Pet. App. at 9.) The court of appeals found prejudicial error, however, in the *timing* of such exclusion. Because the jury had rendered its verdict based on the improperly admitted evidence, the court of appeals found that the district court no longer had discretion to grant judgment as a matter of law in favor of General Electric and was instead restricted to ordering a new trial. (Pet. App. at 8-10.) The court of appeals therefore reversed the grant of judgment as matter of law in favor of General Electric and remanded. (Pet. App. at 10, 15.)

The Ninth Circuit dismissed the appeals of those plaintiffs who were subject to the district court's new trial order and whose only reviewable issue was a procedural objection to service by Federal Express. (Pet. App. at 4-7, 15.)[6] Although disagreeing with the district court's finding that Federal Express service was the equivalent of service by mail, the court of appeals found the issue moot in light of amendments to the Federal Rules of Civil Procedure which made clear that the timely filing of post-trial motions rather than the method or date of service preserved a party's right to post-trial review. (Pet. App. at 4-5.) The court of appeals did not conclude that

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[6] The court of appeals' procedural ruling applied to nine of the plaintiffs. Six of those plaintiffs also were parties to the merits-appeals which the court of appeals went on to consider. *See infra*, text at 6-7.

service was in fact untimely or address any of General Electric's alternative arguments on service, and it did not need to do so.

The court of appeals also dismissed the appeal of plaintiff Carlson, who was subject to the new trial order and presented no reviewable issue. (Pet. App. at 5-7, 15.)[6]

In light of the remands, all parties are now before the district court. The district court will conduct new trials with respect to those plaintiffs who had both sufficient (*i.e.* more-probable-than-not) and admissible evidence of injury consistent with the rulings of the court of appeals and with those rulings of the district court which were not disturbed on appeal.

SUMMARY OF ARGUMENT

Petitioners bring two primary arguments to the Court. Neither warrants the Court's exercise of its extraordinary and discretionary *certiorari* jurisdiction.

First, petitioners take issue with the application of *Daubert* in this case. Contrary to their assertions, *Daubert* does apply to diversity cases, and the court of appeals

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[6] Carlson and Hopkins argue that it was a "departure from usual and accepted judicial procedure, justifying this Court's exercise of its supervisory powers," for the court of appeals to decline to rule on the merits of their appeals. (Hopkins Pet. at 25-29; *see* Carlson Pet. at 24-25.) Carlson and Hopkins also each advance here their positions on the merits of those issues they claim the court of appeals should have reached, but did not. (For example, Carlson argues that the district court "*sua sponte* resurrected subissues that both parties and the court had earlier waived under [Federal Rule of Civil Procedure] 49(a)." (Carlson Pet. at 22.) Similarly, Hopkins argues that General Electric "failed to preserve any issue relative to the jury instructions." (Hopkins Pet. at 28-29.)) It is settled law that the courts of appeal have general jurisdiction only over final judgments and that orders granting new trials are interlocutory and not immediately appealable. *E.g.*, 28 U.S.C. § 1291 (1998); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). General Electric does not otherwise address these arguments in its opposition.

(like all of its sister circuits) required of petitioners exactly what *Daubert* itself requires—that they make some logical showing that their experts' opinions were grounded in good science. The court of appeals correctly reviewed the district court's rulings and correctly concluded that petitioners had made "no showing" of reliability. Petitioners' disagreement with the court of appeals' conclusion does not rise to the level of a *certiorari* concern.

Second, petitioners object to the court of appeals' discretionary determination that it would apply the amendments to the Federal Rules of Civil Procedure to this case, which was pending at the time of the amendments. Petitioners' arguments ignore this Court's instructions to the federal courts in this regard: the amendments "shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995). Petitioners' arguments also ignore the entirely uniform application of this Court's Order in dozens of decisions of the federal courts of appeals, including the decision below. No new or important issue was decided by the court of appeals, and no *certiorari* considerations are implicated by the court of appeals' decision.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW RAISED NO NEW ISSUE, MUCH LESS A COMPELLING ISSUE, WITH RESPECT TO *DAUBERT* AND PROPERLY HELD THAT *DAUBERT* APPLIED TO A DIVERSITY CASE PENDING IN FEDERAL COURT.

Petitioners Williams and Carlson contend that the district court, or the court of appeals, or both, erred in applying *Daubert* under the facts of this case. The decisions below did not raise any new issue, much less a

compelling issue justifying the exercise of this Court's *certiorari* jurisdiction, with respect to *Daubert*.

1. Carlson argues that the *Erie* Doctrine dictates that evidence need not be admissible under *Daubert* so long as the evidence is of the type which may be "sufficient" to sustain a judgment under state substantive law. (Carlson Pet. at 13-15 (citing *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).) His position is wrong. The Federal Rules of Evidence, including Rule 702 and hence *Daubert*, as a general matter govern the admissibility of all evidence in all cases—including diversity cases—in federal courts. If a Federal Rule of Evidence covers a point in dispute, Congress has mandated that such Rule be followed. *See* Fed. R. Evid. 101. Thus, in *Daubert*, itself a diversity case from California, this Court stated that because it was basing its decision "on the content of the congressionally-enacted Federal Rules of Evidence," it did not need to address the *Erie* Doctrine. 509 U.S. at 589 n.6.[7] *See also, e.g., Stutzman v. CRST, Inc.*, 997 F.2d 291, 295 (CA7 1993) ("We hold that the Federal Rules of Evidence govern the admissibility of expert testimony in federal diversity cases."); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054 (CA4 1986) (same); *Dawsey v. Olin Corp.*, 782 F.2d 1254 (CA5 1986) (same).

Moreover, Carlson misstates the facts when he asserts that the federal courts cannot apply *Daubert* in a manner consistent with Washington state law. (Carlson Pet. at 9-17.) The *Schudel* court specifically referred to the Washington state sufficiency standard in addressing the relevance prong of *Daubert*. (Pet. App. at 11.) The *Schudel* court properly held:

> A court's determination of relevance must consider the applicable substantive standard. Under Wash-

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[7] When *Daubert* was issued, California state courts applied (and even now still apply) the entirely different admissibility standards of *Kelly/Frye*. *E.g., People v. Leahy*, 8 Cal. 4th 587, 597-604, 882 P.2d 321, 323 (1994) (citing *Frye v. United States*, 293 F. 1013 (CADC 1923)).

> ington tort law, a plaintiff must show that "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wash. 2d 814, [824], 440 P.2d 823, 830 (1968). . . . Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries. . . .

(Pet. App. at 11 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320-22 (CA9 1995) (*Daubert II*) (emphasis in original).) The district court had properly identified the same standard. (Pet. App. at 46 (quoting *O'Donoghue*, 73 Wash. 2d at 824, 440 P.2d at 830) (a "might have" or "possibly did" opinion is "nothing more than conjecture").)

2. If *Daubert* applies, which of course it does, Carlson and Williams alternatively seek clarification as to whether *Daubert* should be read to accept more expert witness opinions, or fewer. (Carlson Pet. at 10-13; Williams Pet. at 18-19.) This results-oriented equation mocks the purpose of the *Daubert* inquiry. *Daubert* and its progeny direct the court's focus to the quality, not the quantity, of expert opinion that is admissible under Federal Rule of Evidence 702. The burden on the trial court is to conduct a highly fact-bound, flexible inquiry as to the reliability and relevance of the testimony. *Daubert*, 509 U.S. at 592-95; *General Electric v. Joiner*, 118 S. Ct. 512, 139 L. Ed. 2d 508, 517-18 (1997). This exercise assuredly sometimes results in the admission of opinion evidence and sometimes results in the exclusion of such evidence. That different facts compel different results suggests only that the federal courts are heeding the directive of this Court to act as a case-specific "gatekeeper" in evaluating each time whether scientific opinion evidence "is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 139 L. Ed. 2d at 519.

3. Williams argues that in this particular case the court of appeals went too far in assuring scientific reliability, but she mischaracterizes the court of appeals' reasoning in rejecting the testimony of her experts. In particular, it is simply wrong to claim, as Williams does, that there was "insistence by the Ninth Circuit opinion below that there be peer-reviewed (specific to the chemical and dosage) literature." (Williams Pet. at 27; *see also* Williams Pet. at 26 (accusing court of appeals of adopting "concept that peer-reviewed studies of the specific organic solvents used at the precise dosages are the only relevant method of evaluating scientific reliability").) Rather, the court of appeals found a complete lack of evidence that the testimony was grounded in good science: "Extrapolation was necessary to make the studies relevant, and *there was no showing that the necessary extrapolation was scientifically acceptable.*" (Pet. App. at 13 (emphasis added).) Such analysis was neither unusual nor improper; to the contrary, it reflected exactly the nature of the inquiry undertaken in every circuit that has had the opportunity to apply *Daubert* in the context of novel medical causation opinion testimony. *E.g.*, *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107-08 (CA8 1996) (analytical gap in opinion failed *Daubert* standards because it improperly left jury to speculate about whether exposure was sufficient to cause injury); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (CA7 1996) ("[w]e are baffled" by expert's failure to make "elementary distinction[s]" regarding exposure and dose); *Daubert II*, 43 F.3d at 1315-1316, 1319 (bald assurances of reliability fail *Daubert* test); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614 (CA7 1993) ("[i]f experts cannot tie their assessments of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury," and so such testimony is inadmissible under *Daubert*).

4. Williams complains that the court of appeals' opinion "fails to identify what standard of appellate review is

being undertaken," and she concurrently insists that the court must have applied an improper one. (Williams Pet. at 20.) Her argument is not supported by the record.

a. First, the standard of review was not disputed by any party to the appeal. Both Williams and General Electric requested abuse of discretion review on evidentiary matters, an unsurprising request given that the Ninth Circuit had expressly adopted and consistently applied this standard—not only on the admission of expert testimony in general but also on *Daubert* issues in particular —well before the opinion issued here. *See Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 596 (CA9 1996) (abuse of discretion standard applies to decision to admit expert testimony under Fed. R. Evid. 702 and *Daubert*); *Daubert II*, 43 F.3d at 1315 (same); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123 (CA9 1994) (same); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500 (CA9 1994) (same, phrased as "manifestly erroneous"); *United States v. Rincon*, 28 F.3d 921, 923 (CA9 1994) (same); *see also, e.g., United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (CA9 1993) (abuse of discretion review applies to rulings on admissibility of expert testimony) (pre-*Daubert*); *United States v. Rahm*, 993 F.2d 1405, 1409-10 (CA9 1993) (same) (citing cases). There is simply no reason to believe that the court of appeals unilaterally and *sub silentio* selected a different standard uniquely for this case.

b. Second, in the first part of its opinion addressing General Electric's appeal, the Ninth Circuit explicitly upheld the district court as properly having "acted within its discretion" in allowing Williams' experts to base their opinions on certain data. (Pet. App. at 12.) Williams fails even to acknowledge this point and cannot reconcile it with her assertions. It is absurd to suppose (and to seek *certiorari* on the supposition) that the court of appeals employed a different standard depending on which aspect of the experts' opinions was under review.

c. Certainly there is no confusion within the Ninth Circuit as to the standard of review that the *Schudel* court applied. In its most recent writing on the subject, the Ninth Circuit has summarized the *Schudel* holding thus: "district court *abused its discretion* in admitting expert testimony when witness 'could not testify to a specific cause and effect relationship . . . between exposure and health problems.' " *Cabrerra v. Cordis Corp.*, 134 F.3d 1418, ——, 1998 U.S. App. LEXIS 1245, *13 (CA9 1998) (citing *Schudel*, 120 F.3d at 997) (ellipsis in original; emphasis added).

d. Finally, Williams' accusations about what the court of appeals "ignored" are grossly speculative. The record on appeal was extensive and included trial testimony, voir dire, affidavits and offers of proof prepared by counsel —all appropriate to the question of whether the district court had abused its discretion. (Williams nevertheless proposes, without basis, that the court of appeals relied "upon the trial testimony of the experts alone, without consideration of the underpinnings set forth in the totality of the Offers of Proof. . . ." Williams Pet. at 23.) But "scientific knowledge" under *Daubert* is not judged by the volume of submissions. The reality is, despite the extensive record on appeal, the court of appeals correctly concluded "there was *no showing*" of scientific reliability. (Pet. App. at 13 (emphasis added).) Such a finding explicitly supports the conclusion that the district court abused its discretion in permitting the opinion testimony. *See, e.g., Wright*, 91 F.3d at 1107-08 (in circumstances closely similar to those in *Schudel*, reversing judgment entered on jury verdict; expert's opinion was "simply speculation" and was therefore inadmissible under *Daubert*) ("a plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover"); *Daubert II*, 43 F.3d at 1319 ("experts' un-

adorned assertions" with no showing of scientific reliability are *per se* inadmissible); *see also, e.g., Rosen*, 78 F.3d at 319 (noting lack of "any experimental, statistical, or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on theory"); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (CA7 1989) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process") (pre-*Daubert*).

5. In sum, Carlson's and Williams' *Daubert*-based arguments do not warrant the Court's exercise of its extraordinary and discretionary jurisdiction. The unanimous decision of the court of appeals does not conflict with any decision of this Court or any decision of any other court of appeals. Nor do the petitions present an important issue of law which needs to be addressed by this Court. Carlson and Williams simply seek reconsideration of the standards for the admissibility of expert testimony set forth five years ago in *Daubert* and affirmed this Term in *Joiner*.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE READILY AND UNIFORMLY ACTED WITHIN THEIR DISCRETION IN APPLYING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE TO A THEN-PENDING CASE IN ACCORDANCE WITH THE EXPRESS INSTRUCTIONS OF THIS COURT.

When General Electric timely filed its post-trial motions, it served copies on certain counsel by hand-delivery and other counsel by Federal Express. Schudel, Williams and Hopkins (collectively, "Schudel" for purposes of this discussion) argue that the motions were technically invalid because they were entitled to receive their service copies by postal delivery rather than by Federal Express delivery. The court of appeals correctly found that Schudel's argu-

ment was moot: amended Federal Rules of Civil Procedure 50 and 59 make clear that the validity of post-trial motions is judged by the date of filing rather than the date or type of service. *See, e.g.*, Fed. R. Civ. P. 50(b) (renew motion for judgment as a matter of law by "filing" within "10 days after entry of judgment"); Fed. R. Civ. P. 59 (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). The ruling was unremarkable and invoked no new or compelling issues of law.

1. This Court has ordered that the 1995 amendments to the Federal Rules of Civil Procedure "shall govern all proceedings in civil cases thereafter commenced and, *insofar as just and practicable, all proceedings in civil cases then pending.*" Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995) (emphasis added). The court of appeals determined that it was just and practicable and so applied the Federal Rules as amended to this case, which was pending at the time of the amendments.

2. As would be expected given to the express language of the Court's order amending the Rules, there is no conflict among the circuit courts as to whether the amendments may apply to matters pending at the time of the amendments. Instead, "courts interpreting these effective dates provisos consistently have held that when it is 'just and practicable,' new Federal Rules may apply to a particular pending case." *United States v. Roberts*, 88 F.3d 872, 878 (CA10 1996) (citations omitted). In consequence, courts in every circuit have exercised proper discretion and applied the amended rules (or not) after considering whether it was factually appropriate, *i.e.*, "just and practicable," in a broad array of cases: [8]

[8] This Court has issued similar Orders in various amendments to the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *E.g.*, Order of April

District of Columbia Circuit: *Barbour v. Merrill*, 48 F.3d 1270 (CADC 1995) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Bayer v. United States Dep't of Treasury*, 956 F.2d 330, 334-35 (CADC 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending on appeal at time of amendment because "unquestionably" just and practicable).

First Circuit: *Silva v. Witschen*, 19 F.3d 725, 727-28 (CA1 1994) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because infeasible and would work injustice); *Freund v. Fleetwood Enters., Inc.*, 956 F.2d 354, 363 (CA1 1992) (declining to apply amended Fed. R. Civ. P. 15 under facts of case because would be "manifest injustice").

Second Circuit: *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468 (CA2 1995) (in *dicta*, noting option to remand to district court for "determination of whether applying the [1991] amended version [of Fed. R. Civ. P. 15(c)] would be 'just and practicable' "), *modified on other grounds*, 74 F.3d 1366 (CA2 1996).

Third Circuit: *MCI Telecoms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1091 (CA3 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment because just and practicable); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298 (CA3 1995) (same).

22, 1993, *reprinted in* 146 F.R.D. 404 (1993); Order of April 30, 1991, *reprinted in* 134 F.R.D. 495 (1991). The illustrative cases in the text arose under these various Orders. By way of contrast, certain Rule amendments may be limited so as *not* to apply to pending cases. *See, e.g.*, Pub. L. No. 104-208, Div. A, Title I, § 101(a) (1996) (amendments to Fed. R. Evid. 413 applicable only to "proceedings commenced on or after the effective date of the amendments, including all trials commenced on or after the effective date"); *see generally* 28 U.S.C. § 2074(a) (1997) (granting Supreme Court the discretion to determine applicability of its federal rules amendments to pending cases).

Fourth Circuit: *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1273-74 (CA4 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because "[n]o injustice would be worked" and applying the amended rule "works to preserve appealability and allows us to reach the merits. . . .").

Fifth Circuit: *Long v. Simmons*, 77 F.3d 878, 879 (CA5 1996) (applying 1995 amendments to Fed. R. Civ. P. 59 to case pending on appeal at time of amendment because just and practicable); *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765-66 & n.8 (CA5 1996) (applying 1993 amendments to Fed. R. Civ. P. 54(d) to case pending at time of amendment because just and practicable); *Elliott v. Tilton*, 64 F.3d 213, 215-16 (CA5 1995) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ford v. Elsbury*, 32 F.3d 931, 933-34 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 3 to case pending on appeal at time of amendment because just and practicable); *Garcia v. Wash*, 20 F.3d 608, 609 (CA5 1994) (same) (application of amendments "prevent[s] the loss of appellate rights"); *Burt v. Ware*, 14 F.3d 256, 257-58 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("appellees will not be prejudiced by employment of the new rules; rather they will simply lose a potential 'windfall' of having the appeal dismissed"); *Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 544-46 (CA5 1992) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending on appeal at time of amendment because just and practicable).

Sixth Circuit: *Ridder v. City of Springfield*, 109 F.3d 288 (CA6 1997) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ridder v. City of Springfield*, 1997 U.S. App. LEXIS 5118 (CA6 Mar. 13, 1997)

(applying 1993 amendments to Fed. R. Civ. P. 26 to case pending at time of amendment because just and practicable); *Runfola & Assocs. v. Spectrum Reporting II, Inc.*, 88 F.3d 368 (CA6 1996) ("it was within the district court's discretion as to which version of Rule 11 applied"); *Spurlock v. Demby*, 48 F.3d 1219 (Table), 1995 U.S. App. LEXIS 4321 (CA6 1995) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because not just and practicable).

Seventh Circuit: *Delgado-Brunet v. Clark*, 93 F.3d 339, 344 (CA7 1996) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable); *In re Generes*, 69 F.3d 821 (CA7 1995) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Cunningham v. Waters Tan & Co.*, 65 F.3d 1351 (CA7 1995) (same); *Cleveland v. Porca Co.*, 38 F.3d 289 (CA7 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund*, 25 F.3d 509 (CA7 1994) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 885-86 (CA7 1993) ("we honor the Supreme Court's express directive, and we therefore hold that the district court should have determined whether it was 'just and practicable' to determine the parties' rights and obligations under the new version of [Fed. R. Civ. P.] 15(c)").

Eighth Circuit: *United States v. Duke*, 50 F.3d 571, 574-76 (CA8 1995) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable).

Ninth Circuit: *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (CA9 1995) (applying 1993 amendments to Fed.

R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("To allow the parties to proceed to the appeal is just. Further, practicality is no problem."); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 887-88 (CA9 1994) (same); *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1501-02 (CA9 1994) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending at time of amendment because just and practicable); *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (CA9 1994) (applying 1993 amendments to Fed. R. App. 4 to case pending on appeal at time of amendment because just and practicable).

Tenth Circuit: *United States v. Platero*, 72 F.3d 806, 811 (CA10 1995) (applying 1994 amendments to Fed. R. Evid. 412 to case on remand at time of amendment because just and practicable); *Dahn v. United States*, 77 F.3d 492 (Table), 1996 U.S. App. LEXIS 2801 (CA10 1996) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Espinoza v. United States*, 52 F.3d 838, 840-41 (CA10 1995) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Cole v. Ruidosa Mun. Sch.*, 43 F.3d 1373, 1385-86 (CA10 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1440-41 (CA10 1994) (same); *In re Search of Premises Known as 6455 South Yosemite, Engelwood, Colo.*, 897 F.2d 1549, 1553-54 & n.5 (CA10 1990) (applying 1989 amendments to Fed. R. Crim. P. 41(e) to case pending at time of amendment because just and practicable).

Eleventh Circuit: *Chudasama v. Mazda Corp.*, 123 F.3d 1353 (CA11 1997) (applying 1993 amendments to Fed. R. Civ. P. 33(a) to case pending at time of amendment because just and practicable); *Silvious v. Pharaon*,

54 F.3d 697 (CA11 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment) ("plain language of Supreme Court's Order indicates that court has discretion as to which version of Rule applies); *Narey v. Dean*, 32 F.3d 1521, 1524 (CA11 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending at time of amendment because just and practicable) ("it is not an injustice for a party to lose the 'windfall' of having an appeal dismissed" on procedural grounds); *Virgo v. Rivera Beach Assocs.*, 30 F.3d 1350, 1355 n.3 (CA11 1994) (same); *Hill v. United States Postal Serv.*, 961 F.2d 153, 156 (CA11 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable).

3. None of these cases adopts a presumption of applicability of a *per se* rule. Nor did the court of appeals do so in this case. Hopkins' accusation that the court of appeals here found the amendments "automatically retroactive," (Hopkins Pet. at 11), is flatly contradicted by the record. The court specifically considered whether, in this case, the amendments would be just—"no prejudice will result"—and practicable—"no additional action on the part of the court or the parties is required to proceed." (Pet. App. at 5.) As the circuits have explicitly and correctly concluded, "the determination of when it is 'just and practicable' to retroactively apply [a Federal Rule], as amended, is necessarily a case-by-case consideration." *Duke*, 50 F.3d at 575. These cases track the guidance of this Court: "Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of a particular case." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 & n.29 (1994).

4. The cases also track "the general purpose of the [federal] Rules," to wit, "to minimize technical obstacles to a determination of the controversy of its merits." *G.F. Co.*, 23 F.3d at 1502 (quoting *United States ex rel. Atkins*

v. Reiten, 313 F.2d 673, 675 (CA9 1963)). *See also, e.g., Conley v. Gibson*, 355 U.S. 41, 48 (1957) (Federal Rules support common law goal to "facilitate a proper decision on the merits). The law accepts as "just" that which favors substance over procedure. *E.g., Burt*, 14 F.3d at 257-58 (not injustice to "lose a potential 'windfall' of having the appeal dismissed"); *Narey*, 32 F.3d at 1524 (same).

5. In *Landgraf*, this Court referred to a party's "diminished reliance interests in manners of procedure" while explaining why it had determined that amendments to the Federal Rules may apply to pending cases where just and practicable. 511 U.S. at 275 & n.29. The Court confirmed: "Because rules of procedure regulate secondary rather than primary conduct, the fact a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." 511 U.S. at 275. This case of course fairly illustrates the point—no "primary" conduct is at play in addressing the mechanics of service of timely-filed motions.[9]

6. Accepting the possibility that the amendments may indeed be applied to pending cases, Schudel alternatively argues that the court of appeals improperly exercised its discretion in applying the amendments to this particular case. (Schudel Pet. at 15-18; Hopkins Pet. at 15-20.) Schudel's factual complaints—made for the first time here[10]—pose nothing worthy of review. But *certiorari*

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[9] Although Hopkins proposes that this Court has never addressed the question of whether the amended rules of civil procedure may apply to pending cases (Hopkins Pet. at 14), both the Court's enacting Order and *Landgraf* provide the answer. Thus, there has never been controversy on the point in the federal courts.

[10] Schudel failed to respond in the court below to General Electric's submission pursuant to Federal Rule of Appellate Procedure 28(j) advising the court of appeals of the amendments to the Federal Rules. Schudel likewise failed to respond to General Electric's Supplemental Brief and motion for leave to file same relating to the

considerations aside, and even accepting the factual record as presented in the petitions, General Electric observes that Schudel cites to no genuine infeasibility or injustice that followed application of the amended Rules, and there is none. Thus, in the only published case *factually* on all fours with this case, the Fifth Circuit concluded, as did the Ninth Circuit here, that it was just and practicable to apply the 1995 amended rules regarding filing of post-trial motions to a matter pending on appeal at the time of the amendments. *See Long*, 77 F.3d at 879.

7. Schudel proposes that the case was not really "pending." (Hopkins Pet. at 15-17; Schudel Pet. at 16-17.) This odd argument finds no support in this Court's enabling Order and defies the record. The district court and then the court of appeals accepted jurisdiction over the case. No party contests that fact. Consequently, the court of appeals had the discretion to apply the amended rules to the case before it. *E.g.*, *Barber*, 34 F.3d at 1273-74 (applying amendments to case pending on appeal); *Long*, 77 F.3d at 879 (same); *Burt*, 14 F.3d at 257-60 (same); *Skoczylas*, 961 F.2d at 544-46 (same); *Ford*, 32 F.3d at 933-34 (same); *Garcia*, 20 F.3d at 6009 (same); *Cleveland*, 38 F.3d at 289 (same); *Duke*, 50 F.3d at 574-76 (same); *Schroeder*, 41 F.3d at 1276-77 (same); *Wallis*, 26 F.3d at 882 (same); *Leader Nat'l Ins. Co.*, 19 F.3d at 445 (same); *Cole*, 43 F.3d at 1385-86 (same); *Hill*, 961 F.2d at 156 (same); *Narey*, 32 F.3d at 1524 (same); *Virgo*, 30 F.3d at 1355 (same); *Barbour*, 48 F.3d at 1270 (same); *cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990) (appellate court may apply amendments to the law in the first instance "if, 'by its terms,' the law was to be applied to pending cases").

8. Schudel next proposes a collage of possible explanations for why the application of the amendments here was

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amendments. Nor did Schudel seek leave to file anything even after the court of appeals addressed the amendments at oral argument.

not "just or practicable." (Hopkins Pet. at 17-25; Schudel Pet. at 15-18.) Schudel misconceives the import of cases such as *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), *Chenault v. United States Postal Serv.*, 37 F.3d 535 (CA9 1994), and *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (CA10 1994), none of which involved the Federal Rules. Those cases re-stated the time-honored principle that a new law which impairs vested rights should not be given retroactive effect absent a clear indication in the law to the contrary. In this case, the enabling Order *expressly* allows application of the amended Rules to pending cases. Further, Schudel had no substantive vested right, impaired or otherwise. More precisely, "[n]o one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U.S. 55, 71 (1949) (quoting *Crane v. Hahlo*, 528 U.S. 142 (1922)).[11]

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[11] Schudel's arguments about the need for "finality" and the importance of "vested rights," (Hopkins Pet. at 20-25; Schudel Pet. at 16-17), in any event spurn the record and fail to address the considerations given by the courts below. The district court accepted General Electric's timely-filed post-trial papers and ruled, correctly, that Schudel had secured a verdict only by relying on a slate of improper and grossly tainted evidence. The court of appeals went even further, finding that a majority of the limited evidence the district court had ultimately found admissible was itself improper and unreliable. Schudel would have his improperly-secured verdicts reinstated by insisting on application of a now-defunct procedural rule. Schudel's equities-based arguments on what is "just and practicable" cannot stand the slightest scrutiny.

Moreover, Schudel's equity argument is baffling even under the old version of Rule 50. He would have General Electric forfeit its right to appeal because, when General Electric timely-filed its post-trial motions, it extended the courtesy of service by overnight mail rather than postal delivery. Schudel's protests aside, there is no innate or constitutional right to service by postal delivery. Indeed, service rules are frequently revised. *See, e.g.*, Fed. Rs. App. P. 25, 26 (1996) (referencing service by commercial carrier); Fed. R. Civ. P. 4 (1995) (same); *see generally* 28 U.S.C. § 2071 (1997) (authorizing district court rulemaking); Fed. R. Civ. P. 83 (same).

9. Finally, General Electric observes that even if the Court saw fit to grant *certiorari* and ultimately determined that the amendments to federal rules may not be applied to pending cases, the ruling would be of doubtful consequence to this case. As General Electric argued in the proceedings below, its post-trial filings, made on the tenth day after entry of judgment and served that day by Federal Express, were proper for several reasons even under the old Federal Rule of Civil Procedure 50 (requiring filing and service within 10 days of judgment): First, Federal Express is indeed the legal and practical equivalent of mail.[12] Second, all parties had consented to service by Federal Express by engaging in service by Federal Express or other alternatives to postal delivery throughout the extensive litigation.[13] Third, lead trial counsel had assumed representation of all plaintiffs, and she had been served by hand-delivery.[14] Any one of those considera-

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[12] *See generally* 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982); 39 C.F.R. Parts 310, 320 (1995); 44 Fed. Reg. 61,181 (Oct. 24, 1979) (suspending Private Express restrictions for carriage of express mail or overnight service). Further, as the district court noted and the comments to the newly-amended Federal Rules of Appellate Procedure observe, parties reasonably may expect private express mail delivery to be more prompt and more reliable than postal delivery. *See* Pet. App. at 21; Fed. Rs. App. P. 25, 26 (comments). Those expectations of course were realized here; Schudel's service copies were delivered overnight.

[13] *See, e.g., Magnusen v. Video Yesteryear*, 85 F.3d 1424, 1431 (CA9 1996) (parties' course of conduct may validate mode of service); *Salley v. Board of Governors, University of North Carolina, Chapel Hill, N.C.*, 136 F.R.D. 417 (MDNC 1991) (same).

[14] General Electric noted that lead trial counsel had signed pleadings on behalf of all plaintiffs, had presented many of the plaintiffs on direct testimony at trial, and had otherwise acted as common counsel. *See, e.g.*, Wash. (E.D.) L.R. 1.2(d)(1) ("filing of any pleading shall constitute an appearance by the attorney who signs the pleading"). Although General Electric always extended courtesy service to all counsel, under the Rules General Electric was required to serve only lead trial counsel, which it did. *See, e.g., Buchanan v. Sherrill*, 51 F.3d 227, 228 (CA10 1995) (rules do not require

tions is enough to defeat Schudel's no-service-by-Federal-Express-overnight-mail complaint, quite apart from any question of the proper application of the 1995 amendments in this case.

The court of appeals did not reach General Electric's alternative arguments, or remand to the district court for further findings, or decide the question of whether service had been effected. It did not need to do so; the amendments to the Federal Rules mooted the inquiry. Thus, although the court of appeals—citing its then-new opinion in *Magnusen v. Video Yesteryear*, 85 F.3d 1424 (CA9 1996)—noted in *dicta* its opinion that delivery by Federal Express did not satisfy mail delivery requirements in the Ninth Circuit, it never "concluded that the attempt to serve Hopkins . . . was ineffective and therefore untimely," (Hopkins Pet. at 2 n.1, 9), or that General Electric's post-trial motions were "untimely," (Schudel Pet. at 10). Indeed, to make such a determination even under *Magnusen*, the courts below would have had to determine, *inter alia*, whether the parties' course of conduct permitted service by Federal Express. 85 F.3d at 1431. No such inquiry was undertaken or needed in light of the Rule amendments.

10. As is the case with their *Daubert*-based arguments, petitioners' arguments on application of the Federal Rules pose nothing new or worthy of this Court's extraordinary *certiorari* jurisdiction. The court of appeals applied the usual principles of interpretation, and its unanimous decision does not conflict with any decision of this Court or any other court. *See Roberts*, 88 F.3d at 878 (noting "consistent" interpretation of the effective date provisos of the amendments). Further, when it issued its decision, the court of appeals was acting on the discretion expressly granted to it by this Court.

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service on each of several counsel appearing on behalf of a party); *Daniel Int'l Corp. v. Fishbach & Moore, Inc.*, 916 F.2d 1061, 1063 (CA5 1990) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 25, 1998

Supreme Court,
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No. 97-1382

In The

Supreme Court of the United States

October Term, 1997

DEBORAH GUARAGNA-WILLIAMS; DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and CRAIG A. THOMPSON,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. NATURE OF MEMORANDUM

This is Petitioners' (Williams, Schudel, Schudel, Schudel, Glass, Thompson, and Froese) Reply to General Electric's Brief in Opposition.

Petitioners adopt by reference those arguments made by the other parties who have petitioned. Supreme Court Rule 12(4). In addition, petitioners offer the following specific arguments in reply to the matter advanced in Respondent's Brief in Opposition.

II. RETROACTIVE APPLICATION OF FED.R.CIV.P. 50(b)

A. General Electric Misstates the Record

Respondent General Electric asserts that its filing and service of post-trial motions were proper even under *former* Fed.R.Civ.P. 50(b), in part because lead trial counsel had assumed representation of all plaintiffs, and she had been served by hand delivery within the time allowed by the former rule. Brief in Opposition at 25.

General Electric cites nothing in the record to support its assumption that anyone was designated lead trial counsel or that any party had affirmatively authorized counsel for any other party to accept service of pleadings on his or her behalf. Nothing in the record supports such an assumption, because no such designation was ever made. Moreover, General Electric failed to raise this argument in support of its position before the trial court, thus preventing the development of a factual record on the issue; litigants in the Ninth Circuit, as elsewhere, are well aware that such a course constitutes waiver of the argument on appeal. *In re Estate of Ferdinand E. Marcos Litigation*, 978 F.2d 493 (9th Cir. 1992).

General Electric failed to make this assertion in the trial court because it would have been an untenable argument. All three counsel represented separate individuals. General Electric admits that it served all of its filings on all three counsel; it claims now that it was doing so as a

courtesy. Brief in Opposition at 25, n. 14. General Electric neither refers to nor attempts to explain how its courtesy extended to toleration of three separate opening statements, three separate direct and cross-examinations of witnesses, three separate closing arguments, and three separate rebuttals.[1] In fact, there was never any doubt that the parties were individually represented. If, as Petitioners argue, it is *former* Rule 50(b) which should have been applied to this issue, there is no doubt that General Electric failed to effect timely service of its post-trial motions.[2]

B. GE Fails to Distinguish Between Retroactive Resuscitation of Lapsed Jurisdiction and Retroactive Application of Procedural Rules in Cases Still Pending

On the merits of the issue of retroactivity, Respondent General Electric lists a variety of cases in which courts have retroactively applied rules of procedure, pursuant to this Court's mandate to do so where just and practicable. *See* Brief in Opposition at 16-21. The cited cases involve such issues as initial service of process under Rule 4, the application of attorney sanctions under Rule 11, the amendment of pleadings under Rule 15, and rules relating to the conduct of discovery.

Insofar as Petitioners can determine, none of the cited cases involves the central point at issue here: whether it is "just and practicable" to apply a procedural rule retroactively where to do so would revive lost jurisdiction and reopen a case in which judgment has become final as a matter of law.

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[1] Nor is it likely that General Electric would tolerate three separate Petitions for Writs of Certiorari as has occurred here.

[2] General Electric attempts to argue that it did, in fact, properly serve all counsel by private delivery service. That issue was decided by the 9th Circuit. Timely service did not occur. That issue was not appealed by General Electric.

When Congress attempted to require just such an outcome this Court emphatically denounced the idea. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 131 L.Ed.2d 328, 1155 S.Ct. 1447 (1995) this Court wrote that:

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments *still on appeal* that were rendered before the law was enacted, and must alter the outcome accordingly. *See United States v. Schooner Peggy*, 1 Cranch 103 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280 (1994). Since that is so, petitioners argue, federal courts must apply the "new" law created by 27A(b) in finally adjudicated cases as well; for the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower-court judgments that are final, is determined by statute, see, e.g., 28 U.S.C. 2107(a) (30-day time limit for appeal to federal court of appeals), and so cannot possibly be a constitutional line. *But a distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates*: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not *(unless the time for appeal has expired)* the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra*, at 109. *Having achieved finality, however, a judicial decision becomes the last word of the judicial*

> *department with regard to a particular case or controversy,* and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes. *See, e.g., Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532 (1985); *Meachum v. Fano,* 427 U.S. 215 (1976).

514 U.S. at 226-227 (emphasis supplied).

This Court's vigorous protection of the rules of finality against Congressional usurpation was not merely rooted in the doctrine of separation of powers. It was also a defense of the right of the individual litigant to finality in judicial proceedings. The Court quoted dictum as venerable as its decision in *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421 (1856):

> "[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . This, as a general proposition, is certainly not to be denied, *especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it*".

18 How. at 431; *Plaut, supra,* 514 U.S. at 226 (emphasis supplied).

As this Court said in *Plaut,* the choice courts face is apparent: "those clear statements must either be honored, or else proved false." *Id.* Under the analysis of this case adopted by the Ninth Circuit and urged by Respondent, courts retain the power to reopen cases in which finality has been attained, by retroactive application of new procedural rules. A party's "absolute" right thus becomes

relative, and a principle of constitutional importance is undermined.

If Respondent's post-trial motions were untimely, it is incontestable that the judgment became final and no timely appeal was taken thereafter. The judgment became "the last word of the judicial department" with regard to the case. If Congress had sought to reopen such cases by retroactive legislation, this Court would have vigorously defended Petitioners' interest in its finality. The Ninth Circuit has undercut the rationale of finality, and contradicted this Court's guidance in *Plaut*, by discounting the value of that interest. The decision of the Ninth Circuit thus contravenes this Court's philosophy, as consistently expressed in cases over a 139-year span. Consistency requires this Court to address why, if finality of judgment is a principle of constitutional weight which cannot be tampered with by the Congress, it is nevertheless "just and practicable" for lower courts to resuscitate closed cases by the retroactive application of procedural rules.[3]

III. THE NINTH CIRCUIT'S APPLICATION OF *DAUBERT* WILL EXCLUDE VALUABLE AND RELIABLE SCIENTIFIC EVIDENCE

The rule of *Daubert* is that "[s]cientific knowledge is reliable if it is 'ground[ed] in the methods and procedures of science' " and "connotes more than subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 at 590, 125 L.Ed.2d 469, 113

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[3] Respondent characterizes the issue as whether Petitioners may keep a "procedural windfall." Brief in Opposition at 22. If Respondent had violated the rules by filing its motions one date late, instead of violating them by a delay in service, no court would find this argument tenable. It is inarguable that violations of court rules can prevent adjudication on the merits, but the alternative is a system in which rules are supplanted by ad hoc procedure. Consistent justice lies in the former, not the latter, approach.

S.Ct. 2786 (1993). In determining reliability, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. (Pet. App at 10-11). Petitioners have offered extended analysis of the variance between the Ninth Circuit's approach and the "flexible inquiry" *Daubert* requires. Petition at 20-29. Respondent discounts the argument, as it must.

In the final analysis, the Ninth Circuit criticized the evidence submitted by the plaintiffs at trial on the ground that it was based on extrapolation from other data, gathered in other circumstances, totally disregarding the other, well accepted method of reliability: the use of a "differential diagnosis". Respondent emphatically asserts that the "extrapolation method" alone had a "gap" in the analytical process that should have barred the use of the evidence and demonstrates the correctness of the rulings below. Brief in Opposition at 12.

In fact, the approach taken by the Ninth Circuit raises troubling questions. Toxic torts, like airplane crashes, sinkings, train wrecks and other disasters, cannot, by definition, be the subject of reproducible experiment. The available literature on exposure to organic solvents is based on studies of low-dose exposure over time, because that is the only form of exposure which can be studied without engaging in a form of human experimentation. The only way to obtain data from the kind of high-dose, short term exposure to toxins is to study the persons, like the plaintiffs here, who survive such experiences. In short, extrapolation from data gathered in different circumstances may be the *only* method for explaining observable results in cases where the causative event cannot be reproduced. Such extrapolation requires the use of two kinds of inference: inference from other studies which are similar (because they involve similar chemicals, dosages, or other factors) and inferences from the observed data obtained from the victims of exposure. The Ninth Circuit rejected the former inferences on the general ground that the background studies on which the trial experts relied

were "too dissimilar." *See* Pet. App. at 12. The court rejected the second kind of inferences, offered by experts who examined the plaintiffs, because "the biochemical mechanism of neurotoxicity . . . has not been demonstrated," Pet. App. at 13, because a "specific cause and effect relationship" could not be described, and because "science has not yet determined the effects of short-term exposure to the solvents involved," *id.* at 14, even though science *has* determined the toxicity of other organic solvents.

The Ninth Circuit has raised the evidentiary bar too high. *All* medical diagnosis is subject to a degree of uncertainty. The process of "differential diagnosis" is accomplished by testing hypotheses in descending order of probability, as various possible explanations are ruled out by testing, examination, or the course of a patient's illness. Good science does not require a physician to arrive at certainty as the fruit of this process. Good science, in fact, requires the investigator to acknowledge Sherlock Holmes' dictum that when other explanations are excluded, whatever remains, must be the truth. The dictum holds true even if the exclusion of competing explanations requires the use of extrapolation, interpolation, and inference. The Ninth Circuit has rejected Petitioners' evidence not merely because of a dispute about an alleged failure to offer dose-specific testing, but because the Ninth Circuit has now disavowed the forensic use of an entire process of medical and scientific reasoning: the differential diagnosis methodology. As set forth in the Petition this process is well accepted and has been approved by other Courts, including the Ninth Circuit.

In a discussion of "good" and "bad" scientific uses of extrapolation, a comparison to a recent toxic tort case in this Court is instructive.

In *General Electric v. Joiner*, __ U.S. ___, ___ L.Ed.2d ___, 118 S.Ct. 512 (December 15, 1997) this Court criticized a plaintiff's proof as inadequate under *Daubert* for two reasons. First, animal studies relied on by the plaintiff's expert were not similar to the facts of the case: the

studies involved infant mice that developed alveologenic adenomas after highly concentrated, massive doses of PCBs were injected directly into their peritoneums or stomachs, whereas the plaintiff was an adult human whose small-cell carcinomas allegedly resulted from exposure on a much smaller scale. *Joiner, supra*, slip op. at 6-7. This Court also criticized four epidemiological studies on which the plaintiff relied; they were not a sufficient basis for the experts' opinions, since the authors of two of those studies ultimately were unwilling to suggest a link between increases in lung cancer and PCB exposure among the workers they examined, the third study involved exposure to a particular type of mineral oil not necessarily relevant to the plaintiff's situation, and the fourth involved exposure to numerous potential carcinogens in addition to PCBs. Slip op. at 7-9. There was therefore a logical gap between the evidence offered and the conclusion the experts drew, a gap which was not crossed by reasoned inference. As this Court said, "[n]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." Slip op. at 9.

The evidence in this case was not defective for the reasons which attended the evidence in *Joiner*. The Ninth Circuit has failed to distinguish between the irrational "ipse dixit of the expert" and the rational process of drawing inferences from available information. The studies relied on in this case were not animal studies of questionable relevance; they were studies of human occupational exposure to similar chemicals which demonstrated the toxicity of organic solvents. Where this Court, in *Joiner*, approved the exclusion of *specific evidence* which was rationally unconnected to the issues at trial, the Ninth Circuit has excluded an *entire mode of reasoning*: the process of reasoning by inference from the available data. This rule will exclude evidence of scientific value and probative force.

Two historical examples prove the point. In 1796, Edward Jenner reasoned that smallpox could be avoided by prior exposure to cowpox; he reached that conclusion at a time when medical science had not demonstrated the mechanism of smallpox transmission, could not explain the immune-system process which made vaccination possible, and could not articulate a cause and effect relationship which would explain the observed data. It was Jenner who first hypothesized the existence of an organism which he named a "virus," but the existence of such an organism could not be *documented* until the development of the electron microscope.

Louis Pasteur's work was similarly "flawed." His belief that effects as dissimilar as infection in humans and the souring of milk were both caused by the introduction of micro-organisms from external sources flew in the face of the conventional wisdom, and his belief that small organisms could kill larger ones was viewed as ridiculous. But even though he could not *articulate* a cause and effect relationship between invisible organisms and perceived effects, and even though medical science had yet to identify the disease process as such, he was able to demonstrate that his inferences were well-grounded by showing a skeptical community experimental data which supported them: the fact that healthy sheep exposed to the blood of sick sheep became sick.

In the absence of other explanations, Pasteur's hypothesis, like Jenner's, gained acceptance *in advance of* the development of definitive explanations for the observed facts, and without the development of a complete theoretical framework for the theory of immunology. Their work had in common the fact that their inferences were reasonable extrapolations from existing data. The fact that the existence of other, more persuasive data could be *imagined* was no reason to ignore the probative force of the evidence at hand.

Daubert should not be read as an insurmountable barrier to any litigant who has the misfortune to be injured by a mechanism which science has not yet fully

understood. The power and probative force of inferential reasoning is well-documented in the history of science. The persuasiveness of a given line of reasoning is a question of weight, not admissibility, as long as the expert's inferences are plain to see and open to cross-examination. In *Joiner*, the expert's "inferences" were actually shorthand for the practice of ignoring logical gaps in the facts; alleged similarities fell apart on close examination. But where, as here, the expert can point to truly similar data developed in other contexts, and follows the accepted medical diagnostic technique of "differential diagnosis," there is far more at work than the mere "ipse dixit of the expert." The probative value of the similarities, like the probative force of any reasoned inference, tied with the differential diagnosis methodology is then for the trier of fact to evaluate.

IV. CONCLUSION

For the forgoing reasons, Petitioners pray that the Supreme Court will grant their petition and correct the errors of the Ninth Circuit.

DATED this 20th day of April, 1998.

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